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IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1931

No. 722

UTAH POWER & LIGHT COMPANY,
a corporation,
Appellant,

v.

EMMITT PFOST, Commissioner of Law Enforcement of the State of Idaho, and FRED J. BABCOCK, Attorney General of the State of Idaho,
Appellees.

BRIEF OF APPELLEES

FRED J. BABCOCK,
Attorney General of the State of Idaho,
SIDMAN I. BARBER,
Assistant Attorney General,
MAURICE H. GREENE,
Assistant Attorney General,
Counsel for Appellees, Boise, Idaho.

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellant, by its Bill of Complaint, seeks to enjoin the enforcement of the Tax Act referred to in its brief, (said act is referred to herein as the Tax Act and is quoted in full in the Appendix) upon numerous grounds which appear in detail from its Statement of Points to be relied upon. By the decision of the Court below on the application for interlocutory injunction, (52 Fed. (2d) 226), the Tax Act was sustained against all objections urged save as to whether, as applied to

Appellant, the act imposes a burden on interstate commerce. A Master was appointed to take testimony on this question, presented here in the Statement of Evidence (R. 56, 84, 96-7). The decision on final hearing is found in 54 Fed. (2nd) 803.

Appellees contend that there are no fatal differences between the title and the act; that the tax is levied only upon electrical energy generated for barter, sale or exchange, that in practical conception generation, transmission and use are not integral and inseparable, but separate industrial operations and activities; and that generation is similar to manufacture and of local situs. The statement that Section 5 of the Tax Act was inserted to secure its passage we consider as not borne out by the record, which does not disclose why the bill failed of passage at the regular session. Said section provides an exemption from the tax of electrical energy used for pumping water for irrigation purposes in Idaho; but further provides that the exemption shall accrue to the benefit of the consumer. These matters are controverted points which will be discussed at length in argument. In the Court below the Appellant urged as an objection to the Tax Act the severity of the penalties imposed for failure to pay the tax. This objection is referred to in Appellant's Statement of the Case, but not included in its Assignment of Errors or Statement of Points to be Relied Upon, and we therefore consider it as abandoned.

The interconnected system of Appellant includes some eleven generating stations in Idaho, all hydro-

electric, employing the power of falling water in or from the streams of Idaho in lieu of the power of burning fuel in steam plants. A part of the electrical energy generated by such stations is distributed to consumers in Idaho, and the remainder transmitted to and distributed in Utah. Such stations are so interconnected by transmission lines, however, as to permit delivery to any point on the system of electrical energy generated at distant stations, since the situs of the plant, the character of machinery employed therein, and the manner of operation thereof do not determine or control the destination or use of their output. Appellant's system is also interconnected with the lines of the Idaho Power Company so as to enable either company to deliver electrical energy to the other; substantial amounts of electrical energy are generated by the other company and sold to Appellant for distribution.

The electrical energy sold by Appellant for use in pumping water for irrigation purposes in Idaho is sold under regulation of the Public Utilities Commission and established rates, intended to provide to Appellant a reasonable return upon its capital investment. The record here does not involve a rate hearing, nor does the evidence disclose whether the operation of the Tax Act would deprive Appellant of a reasonable return. The statement of Appellant that in excess of 72 per cent of its revenues from Idaho business is now demanded by the State of Idaho in taxes is without relation to the issues here presented. Appellant's revenues in Idaho accrue from the sales of electrical energy,

whereas the tax imposed is laid with respect to the activity of generating electrical energy for sale, and without regard to its subsequent transmission in intrastate or interstate commerce.

We concur in the suggestion of Appellant that there is no substantial dispute as to the facts, scientific or practical, relating to the manner of operation of appellant company, and to the generation, transmission, and distribution in sale of electrical energy. The differences that arise relate to the selection of facts to be considered material and controlling and the emphasis to be placed thereon.

POINT I.

THE TAX IS IMPOSED UPON THE ACTIVITY OF GENERATION AS AN INTRASTATE OCCUPATION, AND WITHOUT BURDEN ON INTERSTATE COMMERCE EXCEPT AS INDIRECT AND INCIDENTAL.

SUMMARY

(a) The tax is laid upon the activity of generating electrical energy for barter, sale or exchange, as an act of production, and without regard to its subsequent transmission in interstate or intrastate commerce.

(b) The process of generation, manufacture or production, which we shall hereinafter refer to as "generation," is a process of converting energy into the electrical form in order to its use in devices and appliances

which require energy in that form. Such change in form is also required in order to transmission over Appellant's system. The change is substantial in character, and is a change in the characteristics of the energy, accomplished by mechanical devices which impress their output with definite physical characteristics as to voltage, current and character as alternating or direct current, according to the design of the mechanical devices employed to accomplish generation. The process is completed before the pulses of energy leave the generator in their flow to the station bus or the transformer.

(c) The essential character of generation is such that the generator does not function to produce electrical energy for barter, sale or exchange, except as its output is called for or demanded by Appellant's consumers. This response of the generator to the demand of the consumer is not inherent in generation, but is accomplished through the use of auxiliary controlling or regulating devices adapted to that purpose. The demand of a consumer's appliance is not related to the production of any specific generator or generating station, but is impressed upon the system as a whole and Appellant supplies the aggregate demand by generation at such station or stations and in such varying quantities between stations as it may determine.

(d) The components of electrical energy are voltage and current. With the voltage and current at which the energy flows from the generator, it may not

be transmitted to distant points (in this case to Utah). The transformer is therefore interposed to change the current and voltage in order to effect transmission. This change is similar to the packaging of goods for shipment, and the output of the generator cannot be said to have entered upon its final journey until it leaves the transformer.

(e) The losses or so-called uses in the system effectually distinguish generation from use, in that the percentage of electrical energy generated by stations which is delivered to consumers, is dependent upon the character of construction of the transmission line and distribution system and their efficiency of maintenance, and not by any character of machinery or manner of operation at the generating plant.

(f) The kilowatt hour is a unit of measurement of an amount of electrical energy that will accomplish a definite amount of mechanical work. It is not a measurement of any period of service, in that it may be generated and/or sold, delivered and used in the fraction of a second or over the period of hours. It is an article of commerce and bought and sold as such.

(g) No tax is attempted to be imposed upon the kilowatt hour itself. The tax is measured by the amount of electrical energy generated without respect to its subsequent transmission, at the first practical point of measurement, and prior to its "packaging for shipment" by the transformer.

(h) The operation of Appellant's system as a whole does not destroy the distinction between the several and separate steps of generation, transmission and distribution in industrial and legal contemplation. These separate steps may be undertaken by separate entities. Transmission is subsequent to generation and similar to the transportation of goods after manufacture. The control of the routing of the electrical energy is in the transmission network and not in the hands of the man in control of the generator. Only the transmission phase is in interstate commerce.

(i) The tax imposed is an excise tax with respect to an activity for which no license is required, and imposed solely because of the act of generating for barter, sale and exchange, without regard to transmission. Where generation is accomplished by others from whom Appellant purchases electrical energy, Appellant pays no tax with respect to its transmission of such energy.

(j) The telephone and radio cases discussed by Appellant are to be distinguished in that they deal only with transportation. The transmission of thoughts, intelligence, and entertainment is not an act of production or manufacture.

(k) The mode of measurement is upheld by the rule of American Manufacturing Company v. St. Louis, infra.

(l) The tax being imposed solely because of the intrastate activity of generation and without respect to

whether the output of the generator is thereafter transmitted in interstate commerce, it is not invalidated by any intent to transport across state lines. The amount of electrical energy generated for intrastate sales is capable of determinination in the practical operation of Appellant's system and with reasonable certainty.

ARGUMENT

For the convenience of the Court, we have endeavored to relate our discussion to the Points made by Appellant. The differences between appellant and respondents as to the facts spring chiefly from the diversities of practical and purely scientific viewpoints. An undue emphasis has been placed upon the mysterious character of electricity, and the fact that it does not have, so far as we may now discern, the substance of material, although Dr. Millikan said that the fundamental unit of electrical energy was the electron, and that they attribute mass to the electron.

To the learned scientists who testified, this subtle, imponderable, physical agency, its essence yet obscure, means simply energy—capable of doing mechanical work; and the same whether considered as the energy in falling water; the chemical energy in coal or gas or oil; the mechanical energy in a moving device, or electrical energy. Doubtless the chemist sees only the presence of the same matter in things of manifest different character in common contemplation. It is a scientific truism that man cannot create anything. The natural

law of conservation of energy invoked here is no more fundamental than the natural law of "the indestructibility of matter" governing operations with ponderable substances. The ordinary mind does not confuse electrical energy with the energy in falling water, in coal or other fuels, or with mechanical energy. Dr. Millikan describes generation as the "process of transfer of the energy from the mechanical to the electrical form * * *. The energy * * * * is * changed from one form to another * * *."

To speak of such transformations as changes in its manifestations is not to alter or obscure the essential nature of the change as substantial, real, and analogous at least to the changes we see in ponderable substances; changes perceptible to our senses and intelligence only through and because of the differences in manifestations. Electrical energy is not an incorporeal conception—it is a reality, a definite physical thing. As Appellant pleads, it is capable of generation, transmission, sale and delivery in quantitative amounts, and is so generated and transmitted or purchased and transmitted, sold, and delivered by Appellant.

Commerce among the states is a practical conception (East Ohio Gas Co. v. Tax Commission, 283 U. S. 465; Public Utilities Com. v. Landon, 249 U. S. 236; Swift & Company v. United States, 196 U. S. 375, 398), and in determining what activities are interstate commerce, the distinctions made by the industry itself between generation and transmission and distribution,

when different companies conduct these operations as separate activities, are persuasive if not controlling as against purely scientific classifications.

> "Illustrations readily occur. A farmer will classify plants differently from a botanist, but the classification of both may, notwithstanding the difference, be logically proper."
> (Heisler v. Thomas Colliery Co., 260 U. S. 245)

DESCRIPTION OF ELECTRICAL PROCESSES

The process of generation is essentially a manufacturing operation, governed by the rule of Oliver Iron Mining Company v. Lord, Hope Natural Gas Company v. Hall, and other cases discussed infra. In order to gain a full understanding of the purpose, nature and effect of generation, attention should be called to certain facts and definitions in the record omitted from the discussion of Appellant.

Confirming this characterization, Dr. Millikan says:

> "The terms 'electricity and electrical energy' are commonly used to designate a particular form of energy which has been found especially adapted for efficient transferring and for general use. Energy in this form is commonly called electricity or electrical energy, to distinguish it from energy in other familiar forms, such as heat energy, chemical energy, energy of falling water and other forms of mechanical energy." (R. 110)
>
> "The great amount of the mechanical work represented by motors and our modern lighting systems, such as employed in an office building, the operation of elevators, radio systems, and doctors' X-Rays are dependent in our modern day life upon

this conversion from the mechanical, generally, into electrical form." (R. 117)

In answer to a question whether we might not state simply that by the transformation we have something with a new name, with different physical characteristics and adapted to new and different uses, he said:

> "Yes. I would prefer to change the form a little bit and say that you have mechanical energy transformed into a new form of energy which is adapted better to certain types of uses than the mechanical energy was. In some instances, uses to which we are not now able to apply mechanical energy. And in others, in order to get a greater facility or a lack of noise or odor or a more flexible control." (R. 117-8)

This character as a manufacturing operation is manifest by the fact that the output of the generator has certain characteristics with respect to current and voltage, frequency, and its character as alternating or direct current; but that no definite voltage or current or frequency, etc., is inherent in generation, or natural to electrical energy. Variable generally, they are fixed by the design and construction of the particular machinery employed to accomplish generation. As Dr. Millikan says:

> "In the generation of electrical energy it is given certain definite *characteristics* with relation to voltage and to frequency. There is no one definite frequency or voltage that is essentially inherent in generation, but they depend upon the character or characteristics of the devices employed * * *." (R. 119-20; italics ours.)

We produce, transport, and use energy in other forms. To quote from the testimony of Dr. Langmuir:

> "* * * However, we must also consider that commercially on a large scale power is transmitted in the form of chemical energy, as, for example, by transporting fuel such as coal on railroad lines to the point of consumption.
>
> "Also we have the large scale transmission of power by pipe lines which transmit natural gas or fuel oil.
>
> "In these cases the chemical energy which is locked up in the fuel is transmitted from its point of origin over the railroad lines, or through the pipe lines, to the point where the fuel is burned or consumed and its chemical energy is released and is converted to heat energy which may be either used directly or may be used to generate electric power." (R. 124-5)

Discussing the fact that each consumer converts this electric energy into some other form of energy which is suitable to his needs, such as heat, or mechanical energy, the witness says further:

> "The energy originally present in Nature is never in practical cases present as electrical energy. Man converts this energy available through Nature into electrical energy, transmits it to the consumer, and the consumer there takes the electrical energy and consumes it by converting it into some other form of useful energy. * * *
>
> "The electrical phase of this process of transferring energy from Nature to a distant point commences in the electric generator. I would regard the passage of the electrical conductors across the magnetic field produced by the field coils as the factor primarily responsible for the generation of electrical power. The whole design of the

generator is such as to permit this action to take place under controlled conditions." (R. 126)

And agrees that while energy may be transported or transmitted in other forms, as in the mechanical form by pulleys and belts or in the chemical form as coal or gas, it must be converted into electrical energy before it can be employed for the operation of the devices and appliances, such as lights, motors, etc., for which the consumer obtains electrical energy (R. 187). And with this, Mr. Peek, Mr. Hale, and Dr. Magnusson agree (R. 189-90; 162-3; 175; 207-8). Mr. Hale, the Chief Engineer of appellant company, says:

> "It must be converted into electrical energy before it can be transmitted and before it can be used for lights, motors and other devices for which we now use electrical energy.
>
> "This process of transformation is complete at the generator, and you have a greater amount of energy there, capable of doing a greater amount of mechanical work, at the generator than you do after transmitting it into Utah." (R. 169)

The consumer uses electrical energy by converting it into mechanical or heat or light energy, in the same sense the consumer uses coal, by converting it into heat energy, or gas. It is patent that the consumer does not convert electrical energy back into the energy of falling water. It is electric energy with which Appellant deals when it buys from the Idaho Power Company or when it sells and delivers to consumers, by meter measurement (Mr. Hale, R. 175). The statement of Mr. Peek that the consumer would not care in what form he re-

ceived the energy if it were just as convenient to him (R. 193), cannot be disassociated from consideration of the fact that Appellant's consumers demand and receive electrical energy as the only form of energy convenient to their purposes.

Any extended discussion of electrical energy with respect to its components and characteristics such as current and voltage will, we think, be more helpful, if postponed until consideration of the function of transformers, infra. An analogy between electrical energy and ponderable substances is somewhat difficult because we do not fully understand the character of electricity. But since it is given in generation certain definite characteristics with relation to voltage and frequency, since electrical energy manifests itself as current and voltage, and the unit of measurement is current x voltage; and since the characteristics which determine whether or not it may be employed with any certain electrical device, and which control the question of its economic transmission, are current and voltage, in practical conception, the manifestations or characteristics by which it is cognizable must be considered as the physical properties of electrical energy. The characteristics by which we distinguish different material substances, or the same substance in altered shape or form, are but like physical differences which we note with respect to their use, employment or measurement. Electrical energy must be regarded as something physical, as distinguished from that which is merely mental or moral. As with a ponderable substance, it is sus-

ceptible of change through artificial processes from one form into another, in order to new or different uses. The function of the generator is to make that available which did not exist before, that is, electrical energy as distinguished from energy in other forms.

The change in form to electrical energy is accomplished in order to the use or employment of those devices which require electrical energy for their operation. Such is the essence of a thousand different manufacturing operations. And this essential step cannot be ignored in order to accommodate Appellant's position that the sole activity engaged in by it is one of the transfer or conveyance of a natural force. Appellant also operates steam generating plants, the output of which is identical with that of a hydro-electric plant (R. 172, 212). Carried to its logical conclusion, the contention of Appellant must be that in the operation of a steam plant, and through the successive functions of furnace, boiler, turbine and generator, it is doing nothing more than establish an energy highway and to render it possible for the consumer to draw from the coal the natural energy locked up therein in chemical form. The lengths to which such an hypothesis must lead are too apparent. A practical conception of this operation was aptly summarized in Finding of Fact V of the Statutory Court, (R. 88).

CONSIDERED AS ENERGY DRAWN DIRECTLY FROM ITS SOURCE

Appellant stresses the fact that the generator produces for delivery to consumers only as called for by them; that the company maintains its facilities and machinery in order and the amount of generation is determined primarily by the demands of consumers from time to time. It is true that there is no storage on Appellant's system. The supply of electrical energy to a consuming device when the contact switch is closed does not follow from the mere operation of natural laws, but is due to the fact that the generating machinery employed is so designed and constructed that it will, almost immediately upon the demand being exerted, increase generation in the required additional amount. This is explained by Dr. Langmuir.

> "* When he closes the switch, the current and power that flow as a result through the device that he thus connects are immediately drawn from the generator. That is, any current which he draws from the line causes an immediate and simultaneous increase in the current delivered by the generator, and this in turn causes more water to flow to the generator. This action is entirely automatic. * * *" (R. 132, 139-40)

Dr. Magnusson further explains this by saying, in substance, in response to a question asking whether the generators were controlled by the consumers in their aggregate demand:

> They are controlled through a system of well conceived regulating devices. * * * The con-

sumer's load actuates the controlling devices, and they control the generator and the turbine.

The consumer initiates the load which is carried by the generator in the sense that it is due to his closing the switch that certain controlling apparatus is placed in operation.

He sets up certain impulses which go back to the generator and cause certain actions to take place there (R. 204, 207, 214).

This is substantiated by Dr. Millikan (R. 120-21; 170). This automatic adjustment of supply to demand is, as we see it, practically analogous to the supply of the natural gas at the consumer's tap. By opening the valve, the consumer takes natural gas as and when and in the quantity he desires (East Ohio Gas Company v. Tax Commission, infra). The function of the system is to keep a supply of natural gas in the pipes to be drawn upon when demanded. It is true that a ponderable substance is here involved and that the manufacture thereof has probably preceded the demand. It must be borne in mind, however, with respect to Appellant's operations, that there is no intimate relation existing between any particular consuming device and any particular generator. The demand made on the electrical system is the aggregate of many consuming devices, and the generators in operation serve to supply the system as a whole without distinguishing between the different points of use of their product.

Nor, with respect to a consumer in Utah, can it be determined that he is obtaining electrical energy generated in Utah or in Idaho, nor whether it was generated by Appellant or by the Idaho Power Company.

Appellant pleads in its Bill of Complaint:

"The demands of plaintiff's various customers in Utah and Wyoming occur on various secondary transmission and distribution lines in said States, which demands are brought partially together through local facilities and completely consolidated at Terminal station near Salt Lake City, Utah. * * *

"* * * Between Terminal and the customers' points of use, electricity or power can no longer be identified by its source, as in Idaho or Utah" (R. 9; Mr. Hale, R. 162).

"The incidence of this combined demand as between the several stations on the system, whether in Idaho or in Utah, is, within the limits of the effective capacity of the several stations, under the control of plaintiff's Dispatcher at Terminal station, under whose directions the different stations may be placed in readiness for service" (R. 9).

To quote from the testimony of Dr. Millikan:

"The man in charge of the transmission line, by opening or closing different switches, will render the output of a certain station available to consumers over that transmission network.

"Q. The mere operation of the generator or the conduct of any man at that plant cannot control the route of that energy over the transmission network?

"A. I understand that to be differentiating sharply between the man who controls the generator and the man who controls the transmission network, and my answer is that the control of the routing of the energy is in the transmission network and not in the hands of the man who is in control of the generator * * *" (R. 119).

We refer also to the statement of Dr. Langmuir:

> "It is possible, however, at any given time, at least when the peak load is not being consumed, to draw the power that is required from the net-work in varying proportions from the various generating stations. That is, if at any given time one hundred thousand kilowatts are needed from the distributing system and there are two generating stations available, they may draw fifty thousand kilowatts from each of these two stations, or they may decide to draw seventy-five thousand from one and twenty-five thousand from the other" (R. 139; Mr. Cheever, R. 148).

With respect to the points to which the output of the generator may be delivered, aside from the question of whether a demand or market exists there, a factor controlling the operations of any industry, delivery is controlled by existing facilities of transmission and distribution lines, just as the product of oil or gas wells being transported by pipe line must follow the route of established and available lines. To quote Mr. Cheever:

> "In other words, the construction of a station at a particular point does not itself determine the points into which electrical power may be taken from that station the next year or the year following" (R. 152).

This is further illustrated by the testimony of the same witness (R. 152), and of Mr. Hale, with respect to electrical energy sold to the Utah Copper Company, which takes delivery at 130,000 volts and distributes over its own system. The Appellant has no control or means of control with respect to the point on their sys-

tem at which it may be used, nor as to what devices it shall be consumed by. To quote Mr. Hale:

> "We meter the energy or power delivered to the Utah Copper Company at a point where our lines contact its line and we bill them upon the basis of that measurement.
>
> "We do not know at any time on what part of their system they are using that energy, nor is it necessary to the operations of our generating plants, or transmission lines that we do know. They may use it at the point of delivery, or some distant point on their lines, or they may use it in one device such as a motor, or in other devices such as lamps and this choice of use on their part makes no difference in the operation and conduct of our system, except, of course, as the amount of demand would vary" (R. 172).

THE FUNCTION OF THE TRANSFORMER—TO PREPARE THE GENERATOR OUTPUT FOR TRANSMISSION

The function of the transformer and the essential effect of its operation is important to this case in considering the point at which electrical energy may be considered to have entered upon its final journey across state lines (Opinion of Statutory Court, R. 59-60; Finding of Fact V, R. 89-90).

Appellant quotes the testimony of witnesses to the effect that the transformer is essentially a gearing device; that the passage of power and energy through the transformer is continuous and uninterrupted; that it changes current and voltage but does not change power or energy and is, in effect, a mere aid to accomplish a

more efficient transfer of energy. The error into which Appellant falls arises from an attempted disassociation of electric current and voltage from electrical power and energy. Mr. Peek says that "Electricity in motion constitutes electric current;" that "Power manifesting itself through the instrumentality of electric voltage and current is known as electric power;" that "Electric current is associated with electrical energy as a vehicle for said energy;" that "Electric voltage like electric current is a necessary vehicle for electrical energy;" and that "Electricity is merely a medium or vehicle for energy in electrical form" (R. 184-6). While Dr. Langmuir refers to the current that is generated, Mr. Peek says that current is not generated. We think, however, that as electrical current it must be considered as created by the generator, since the electrical phase begins definitely at some point within the generator and before the current may be said to have left the generator (R. 127).

From these confusing statements, it is necessary that we adopt some practical theory as to whether or not the function of the transformer in materially changing the electrical current and voltage operates to effect a substantial change in the characteristics of the electrical power or energy passing through the transformer. Mr. Cheever refers to current as one element of power, and we think it must be so considered in view of the fact that the witnesses are all in agreement upon the point that electrical power or energy manifests itself through the instrumentalities of current and voltage and that

the measurement thereof is current x voltage. We have likened the manifestation of electrical energy through current and voltage to the different manifestations of ponderable substances, through altered forms and shapes, to the physical senses, and considered current and voltage as the physical characteristics or physical properties of electrical energy. The substantial character of the change accomplished by the transformer is established by two things: first, without such change the electrical energy could not be transmitted from points of generation in Idaho to points of use in Utah without a loss of substantially the greater part thereof in transit. To quote Dr. Millikan:

> "* * * For illustration, electricity could be generated at 6600 volts, and economically transmitted for a distance of a few miles, and used by the consumer whose motors are operated by that voltage, without any process of voltage transformation at either end of the circuit. This would probably be done under such conditions of transmission and use; but as distances of transmission increase, transmission at such a relatively low voltage involves either excessive size of conductors or excessive losses in transmission, and the economic and practical thing to do is to step up the voltage, that is, increase the pressure, for the sake of economy in transmission. The transformers, therefore, are merely an aid to the transmission of energy in the electrical form or what we call electricity" (R. 116).

Mr. Hale, the chief engineer of the system, says:

> "We can transmit 2300 volts or 6600 volts current for some distance, but it would be impossible

to transmit that over the system we now use—that is, over the wires or the conductors—and get any appreciable part of that energy down to consumers in Utah" (R. 170).

Appellant generates a 2300 or 6600 volt current and transmits a 44,000 or 130,000 volt current (R. 163). The transformer is therefore interposed to change the current and voltage of the electrical energy so that it may be transmitted over Appellant's system. Secondly, electrical devices and appliances are designed and constructed to function with certain currents and voltages. The change affected by the transformer is such that devices which could be operated with the current and voltage in the line leading from generator to transformer would refuse to function if attached to the line upon the other side of the transformer with the different current and voltage found there and their attachment at such point would either destroy the device or disrupt the system (Mr. Hale, R. 170; Mr. Peek, R. 191-2). With an understanding of these facts, it is difficult then to comprehend the statement of Mr. Peek (R. 189) that power or energy is not changed through the intervention of the transformer, since this change in characteristics is a change in the two physical properties we recognize in and identify with electrical energy.

While the flow of electric power is continuous through the transformer, "the current, however, that comes in one end of a transformer is kept separate from the current which goes out of the other end" (Dr. Langmuir,

R. 127). The statement of Mr. Peek that the transformer is used to connect circuits of different voltage and current must not be considered to mean that the different circuits with different voltage and current could exist independent of the transformer. We have but the one source of *electrical* current, i. e., in the generator. The purpose of the transformer is to change the current and voltage which flow from the generator, a change made under controlled conditions, dependent upon the design of the transformer used. The two metallic circuits have no physical contact but are effectively insulated in the transformer and the current upon the secondary circuit is induced from that flowing in the primary winding. It may be noted that there is a similarity here between the operation of the transformer and that of the generator and, as well, a similarity between Appellant's contention that the transformer is purely a transferring device and its conception of the generator as merely a transferring device. Comparing the two differences, Mr. Hale says:

> "* * * The operation of the generator and that of the transformer is somewhat similar. You have no physical contact between the two parts in either, but you have a magnetic field of force in one, cut by the moving conductors—that is in the generator. While in the transformer, this magnetic field cuts the wires of the secondary circuit" (R. 169).

And this statement is substantiated by Dr. Magnusson (R. 201-2), and by Mr. Peek, who says in substance: that there is a similarity between the operation of the generator and the transformer; and if he were

starting the industry, he might call the generator the transformer, because its function is to transform energy, or make it available so that it can be transmitted over the transmission line, that it would not be practical to transmit any such distance as 100 miles with the 2300 or 6600 volts at which Appellant generates—for any such distance high pressure would be used—the transformer is an economical measure to reduce friction losses—transmission could be had at 2300 volts by using a larger conductor, but it would cost tremendously more (R. 191).

Since in the operation of Appellant's system the electrical energy may not be transmitted until the change has thus been made by transformer action, in any practical conception it must be considered that the electrical energy is not in final transit to consumers until after it leaves the transformer, and that the practical effect of transformer operation is to package the electrical energy for transmission or shipment. Emphasis is placed upon the fact that in the operation of the transformer there is no arrest or interruption of the movement of energy. Mere continuity of movement during manufacture, from source of raw material to loading upon the cars for shipment would not operate to change the essential character of the operation as one of manufacture, nor deprive it of local situs. A further separation of generation from use is marked by the employment of transformers in the distribution system. Except for such consumers as the Utah Copper Company, which takes delivery at high voltage and

distributes over its own system, deliveries are made at low voltages obtained through the use and operation of subsequent transformers, which induce a separate current upon a separate metallic circuit, with greatly reduced pressure (R. 164).

LOSSES, OR SYSTEM USES

In considering the intimacy between generation and use, there is found a substantial difference between the total amount generated and the aggregate of consumption by the devices employed for the utilization of electrical energy. Appellant pleads losses in transmission and distribution of approximately 20 per cent. In part this difference is consumed by the system, in part it is due to losses similar to friction losses, increasing somewhat with the length of line, (R. 151); as well as there may be losses similar to leakages, or grounds, in the useless generation of heat (R. 118-19, 121). The importance of these losses to this case is to emphasize the distinction between generation and transmission as separate processes. As Dr. Millikan says:

> "* * * The amount of energy or the percentage of the output of a plant which reaches the consumers and is put to beneficial use or employment is dependent upon the character or construction of the transmission line and of the equipment, such as transformers used in connection therewith, and upon the efficiency of maintenance and insulation and the like characteristics of the transmitting line" (R. 119).

The output of the generator, measured in practica

terms of the amount of work it will accomplish, is calculable only at the generator (R. 119; Mr. Hale: R. 169). Appellant purchases electrical energy from the Idaho Power Company which is generated by the latter company. In turn, certain municipalities served by Appellant do not generate but purchase electrical energy from appellant company and distribute and supply it to their consumers. In either instance the producer is not concerned with the efficiency of the distributor's system and does not care whether the major part of the energy it delivers is lost or wasted in transit. In this situation, it cannot be said that generation and use are integral and inseparable. We direct attention to the fact that losses may be exactly measured, a fact of particular importance when considered in relation to Appellant's Point IV. The output of a station is measured (Exhibit R. 160), the amount delivered to Terminal Station can be accurately measured, and the losses between Terminal Station and the point of delivery to customers can be determined with fair accuracy (R. 173-4). The flow of energy passing any point of the system can be definitely ascertained, and this is done as a practical and commercial operation (Dr. Magnusson; Mr. Rupp, R. 201, 211).

THE KILOWATT HOUR IS AN ARTICLE OF COMMERCE

It is thus defined by Mr. Peek:

"Electric power used through a period of time is known as electric energy. It is measured in kilo-

watt hours, and is bought and sold as an article of commerce" (R. 186).

"Similarly, a kilowatt hour may be translated into terms of mechanical energy. Horsepower hours, it might be called. After all, these are merely mechanical expressions of the ability to accomplish work. What the customer really wants is something to do work, and that is what he pays for, if I may get a little bit commercial" (R. 195).

The theory of Appellant that it is a mathematical product of the power relation between generator and receiving device and the duration of that relation, is difficult of practical conception in view of the fact that the amounts of generation exceed the aggregate of amounts used by receiving devices,—the difference being the amount of system losses—and of the further fact that the relation does not exist between generating station and any particular receiving device, but merely between transmission system and generating stations (Mr. Hale, R. 162, 166). The question that arises is whether the kilowatt hour is the unit of measurement of a quantitative amount of electrical energy or of service. It may be said that a gas company renders service when it maintains a flow of gas in its line connecting with the consumer's pipes under adequate pressure so that the consumer may obtain gas therefrom at his pleasure, and in such amounts, within the effective capacity of the system, as he desires during any given period of time. Delivery to him is not instantaneous, nor in package form, but involves the volume of flow and the factor of time. Such a definition,

however, would necessarily classify the delivery of most commodities as service rather than sale.

The testimony of all the witnesses was similar to that of Mr. Hale: "A kilowatt hour is the ordinary unit of measure of electrical energy and an amount of energy that will accomplish a certain amount of mechanical work" (R. 170). It is similar to the measurement of energy in gas by cubic feet, or gasoline by gallons, and is not merely mathematical, but commercial, practical (Dr. Mousson, R. 205). Appellant has quoted Dr. Langmuir to the effect that a consumer pays, not for the rate at which the work is done, but for the total amount of work done. The kilowatt hour is not employed to measure the duration of time since a single kilowatt hour of electrical energy may be generated or transmitted or used in the fraction of a second or over the period of several hours. The record shows that Appellant delivers to the Utah Copper Company at a load as high as 37,000 kilowatts. This would mean a delivery of more than 10 kilowatt hours per second, while a householder might not use an equivalent amount in a week. It is a commodity that the consumer uses as he desires and in such device as he elects. The Appellant is without control of the employment he may choose to make of it, and in fact without knowledge of the use to which it is being put. To quote Dr. Millikan:

> "Its use is determined by his desires as between one device and another. The generating station has no control over that choice between different uses at all. The user may want heat energy, as in an electrical cooker, or he may want mechanical

work, and the generating system has no means of differentiating or controlling such customer's uses * * *" (R. 118).

It is true that the kilowatt hour is measured only as it is transmitted and used, because of the fact that delivery is practically instantaneous with generation. We see no distinction to be made, however, because the element of time is so short between generation and delivery as distinguished between the production and delivery of other commodities. The tax attaches because of the act of generation, and the measurement adopted is of amounts generated and is the practical method of measurement of generation and not of amounts transmitted or sold or used. It may be that this measurement of generation is made while the output is also being used, but it is, however, not a measure of the amount used, nor of the duration of use.

ONLY THE TRANSMISSION LINE OF APPELLANT'S SYSTEM OPERATES IN INTERSTATE COMMERCE.

The description of Appellant's system, found on pages 35-37 of its brief, relates to facts and conclusions which assist the argument that generation is a mere integral part of a transfer, when the technical, scientific point of view is considered. The following important facts should be considered: Appellant's lines are connected as well with those of the Idaho Power Company, so that Appellant may generate and deliver electrical energy to that company when its require-

ments demand, or purchase and receive electrical energy generated by that company for distribution and sale to Appellant's consumers (Mr. Hale, R. 157-8). Appellant commonly buys substantial amounts of electrical energy generated by the other company (R. 171-2). In nowise can Appellant be considered as generating the electrical energy it purchases from the Idaho Power Company. Upon this interconnected system electrical energy is delivered from such stations as selected to bear the load. Thus, the St. Anthony or Ashton plants may be shut down, and the requirements of the communities ordinarily supplied by those stations met with electrical energy generated by the Bear River stations. The points which may be supplied from the output of a station are governed only by physical connections through transmission lines. The question of where markets will exist from time to time for the output of a station is, as with manufacturers generally, one of speculation (Mr. Hale, R. 170, 174). To what customers or markets Appellant supplies the electrical energy it purchases from the Idaho Power Company is a matter of no concern to the latter. The demand may be an aggregate of that made by many different individuals, but to the Idaho Power Company it represents merely a demand of Appellant for more electrical energy, and without relation to any individual consumer.

The fact that Appellant's system is operated as a whole does not compel consideration thereof as a single, unitary operation. An analogy is found in the pipe line cases. The oil or gas company may conduct all the op-

erations of production, transmission, and distribution, or but one or more of such operations. Yet the conduct of each operation is dependent upon the others, and, similar to Appellant's situation, the destination of the product of the well is limited by the fixed facilities of existing pipe lines. The line cannot function without well production. Similarly, well production of oil, transmission to refineries, refinement of gasoline, transportation and sale and distribution may be accomplished by a single company, yet this conduct as a single enterprise does not control the character of the successive steps as interstate or intrastate.

Mention is made of the obligation of Appellant's contract with its consumers. That the character of this engagement as one of supply or of service will be determined by the practical effect and operation thereof, rather than by a designation given by the parties, requires no discussion. However, the contract does not require generation by Appellant, but merely the delivery and distribution to consumers of electrical energy. Nor does it relate to generation at any particular place. From what source Appellant obtains the energy with which to fulfill its contractual obligations is immaterial to the consumer (East Ohio Gas Company v. Tax Commission, infra).

The local situs of generation is further emphasized by consideration of the steam generating plants, which Appellant has in Utah, and which deliver their output to the same system (R. 157). To summarize the testimony of Dr. Magnusson. whether generation is accom-

plished by the utilization of the power of falling water or the power of burning fuel, there is no distinction between the kind of energy which flows from the generator. It is exactly the same kind of energy. There are instances where it is more economical to generate by means of water power, and there are other situations where it is more economical or more desirable to generate by steam, using oil or some other fuel as the heat agent (R. 212). This is substantiated by the statements of Mr. Cheever (R. 150, 153), and by the testimony of Mr. Hale, present chief engineer, in substance, that in lieu of using its hydro-electric stations in Idaho, Appellant could generate at Utah stations constructed for that purpose and utilizing the power of burning fuel instead of the power of falling water, and that by so doing the losses in transmission from distant points in Idaho to such point would no longer exist and the expense of maintenance of transmission lines would be saved (R. 172-3). Instead, Appellant uses the power of falling water, in Idaho, to generate its electricity.

DISCUSSION OF FINDINGS OF THE STATUTORY COURT

Appellant complains as error of the finding of the Court that the kilowatt hour is a unit of measurement of energy as a physical thing and not of a period of time nor of service, and of the failure to find that the kilowatt hour is a mathematical product of the power relation between generator and receiving device and of time. (Page 51, Appellant's Brief). The evidence sus-

taining the finding adopted has been discussed (supra, page 35). The contention that the electric system is merely a vehicle for the transfer of energy, with the statement of Mr. Peek that current is merely a vehicle, that voltage is merely a vehicle and that electricity is merely a vehicle (R. 184-6) belongs too much to the realm of metaphysics when viewed in connection with the pronounced differences between electrical energy and energy in other forms, and the fact that electrical energy manifests itself through the instrumentality of current and voltage and is measured by current and voltage.

That the process of conversion to energy in the electrical form is completed at the generator is amply demonstrated by the fact that the output of the generator is in the form of electrical energy and as such is definitely and accurately measureable. (Exhibit, R. 160; Mr. Hale, supra, page 21; Dr. Millikan, R. 119; Dr. Langmuir, supra, R. 133). The process of generation is not completed at or by the receiving device, when, as Dr. Langmuir says, the receiving device takes it as electrical energy and converts it into some other form of energy.

Finding of Fact V (R. 89, 90), to the effect that the employment of the transformer is essential to change what Dr. Millikan speaks of as the characteristics, and Dr. Langmuir as the manifestations, of electrical energy, i. e., current and voltage, and that without such change Appellant cannot transmit the output of its generation stations over its system, is amply sustained

by the evidence. (Mr. Hale, supra, page 30; Dr. Magnusson, R. 202; Dr. Millikan, supra, page 30). That these changes are substantial in effect in that they permit transmission otherwise impossible over Appellant's present system, and would operate to destroy an appliance rated to the current and voltage of generation is not denied; while by all witnesses it is admitted that the measurement of electrical power is current times voltage. Electrical energy cannot be considered apart from electric current.

The use and purpose of the transformer justify the finding of the Court that the output of the generator is measured before it starts in transmission (R. 59). It is admitted that there is an absolute continuity of movement of energy—but to that point, the gas in Hope Natural Gas Company v. Hall may be flowing into the pipe line on its journey in interstate commerce before the meter measures the quantitative amounts considered in computing the tax, and with a continuity as absolute from every practical conception. The Exhibit (R. 160) shows the output of the generation stations in exact figures, and Appellant pleads the fact of losses in transmission and distribution and the delivery of lesser amounts to consumers (Bill of Complaint, par. 8, R. 4, 5).

Appellant places much emphasis upon the assertion that the tax here is not computed upon the value of amounts generated and prior to transmission but at a unit rate on the output. The difference affords no distinction (Cornell v. Coyne, supra). The incidence of

the tax is not upon the kilowatt hour, but upon the producer, as an excise levied because of the activity of generating for barter, sale or exchange. The state may adopt, for this purpose, any reasonable and fair mode of measurement or computation. Related wholly to an intrastate occupation, as it is, the subsequent transportation of the physical thing produced in interstate commerce becomes immaterial.

DISCUSSION OF AUTHORITIES

Admitting that the transmission and sale of electrical energy across state lines is interstate commerce, appellant is engaged in the process of generation as a separable industrial operation from that of transmission; and as an intrastate activity similar to the manufacture of wares or the production of a natural resource, and within the rule of Heisler v. Thomas Colliery Company, 260 U. S. 245, Oliver Iron Mining Co. v. Lord, 262 U. S. 172; Hope Natural Gas Co. v. Hall, 274 U. S. 284, and American Mfg Co. v. St. Louis, 250 U. S. 459. While, in Public Utilities Comm. of R. I. v. Attleboro Steam & Electric Co., 273 U. S. 83, the power company was engaged in generation as well as transmission, the rate charged was a single and inseparable one, based on amounts delivered, and if transmission was in Interstate Commerce, was beyond control of the state. We do not consider the decision to hold that generation was an interstate activity.

In a long line of cases it is held that generation is equivalent to or an act of manufacture of production.

Calling attention to the fact that in a great number of these cases we find the power company with its assumed technical viewpoint asserting that it is engaged in an act of manufacture, we quote from State v. Interstate Power Company, 118 Nebr. 756, 770-1, 226 N. W. 427, 432-3, as illustrative of the reason of these cases:

> "But this feature of the case is met by the defendant with the further contention that electricity or electrical energy as supplied by them, as well as their competitors at Hartington, is not a 'commodity,' nor 'a raw product,' nor 'a manufactured product,' nor is it a 'thing in general use,' nor 'any article' or 'product,' as these terms are employed in the provisions of the laws of Nebraska on which the state relies in this case that, in truth, and in fact, they are engaged in furnishing a 'service' * * *.
>
> "* * * 'Product' is defined by authoritative lexicographers as 'a thing produced by nature or the natural processes; that which is produced by an action, operation or work; a production; the results; that which results from operation of a cause, consequence, or effect.' So, too, the word 'commodity' has been defined, 'a thing of commodity; a thing of use or advantage to mankind; especially useful products; material advantages, elements of wealth;' also 'a kind of thing produced for use or sale; an article of commerce, an object of trade; especially goods, merchandise, wares, products; anything that one trades or deals in.' Indeed, a distinguished economist has defined it: 'A commodity is any portion of wealth.' Thus, in the language of everyday life and in the strictly commercial sense of the term, 'electricity' is 'produced,' 'stored,' 'measured,' 'bought and sold.' It is moved or transported from place to place in containers or by cable. It is something that one trades

or deals in. We buy it and pay for it and determine the amount of our purchases by definite and well-understood 'standard.' Brought into being as a product, it exists in modern life as a commodity. The conclusion is that, as a matter of strict definition, 'electricity' in the commercial sense of the term is not only included within the literal terms of the statutes on which the state relies, but is plainly within the reason and spirit of the enactments, and that the principles of the common law are not without application to the situation before us. * * *"

(Nevada-California Pr. Co. v. Hamilton, 235 Fed. 317, 326; Pacific Gas & Elec. Co. v. United States, (9th Circuit) 45 Fed. (2d) 708; Bates Machine Co. v. Trenton & N. B. R. Co., 70 N. J. Law 684; Beggs v. Edison Elec. Lt. & Illuminating Co., 96 Ala. 295; Lamborn v. Bell, 18 Colo. 346; Commonwealth of Pennsylvania v. Northern Elec. Lt. & Pr. Co., 145 Pa. 105; People ex rel. Brush Elec. Mft. Co. v. Wemple, 129 N. Y. 543; Hetherington v. Camp Bird Mining, etc. Co., 70 Colo. 531; McMillan v. Noyes, 75 N. H. 258; Burke v. Mead, 159 Ind. 252; In re Consolidated Elec. Storage Co., 26 Atl. 983 (1893, N. J.); People ex rel. Edison Elec. Lt. Co. v. Campbell, 34 N. Y. S. 711; State v. American Sugar Refining Co., 108 La. 603; Commonwealth ex rel. McCormick v. Keystone Elec. Lt., Ht. & Pr. Co., 193 Pa. 245; Duke Power Company v. Bell, 156 S. C. 299; Columbia Ry. Gas & Elec. Company v. South Carolina Tax Commission, 134 S. C. 319.)

The tax being imposed solely upon the activity of generation, it is therefore within the rule of Heisler v. Thomas Colliery Company and other cases cited, supra. Neither intent to transport in intrastate commerce subsequent to production or manufacture, (Crescent

Cotton Oil Co. v. Mississippi, 257 U. S. 129; Coe v. Errol, 116 U. S. 517; Cornell v. Coyne, 192 U. S. 418; La Coste v. Department of Conservation, 263 U. S. 545; Arkadelphia Milling Co. v. St. Louis, 249 U. S. 134); nor the fact that the output is to fill existing contracts (Oliver Iron Mining Co. v. Lord, supra; Diamond Glue Co. v. United States Glue Co., 187 U. S. 611), nor continuity of movement, (Public Utilities Comm. v. Landon, 249 U. S. 236; Hope Natural Gas Co. v. Hall, supra; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465; Atlantic Coast Line R. R. Co. v. Standard Oil Company, 275 U. S. 257), operate to render the activity of production one of interstate commerce.

In Cornell v. Coyne, supra, the tax imposed was a unit one of 1c per pound on filled cheese. The plaintiffs in error manufactured filled cheese under contract for its export and shipped their entire product as soon as prepared. A distinction such as here contended for was made by the court between manufacture and export, and the tax and sale held not a tax or burden upon exportation. The court, speaking through Mr. Justice Brewer, cited Kidd v. Pearson, 128 U. S. 1, to the point that:

> "* * * commerce succeeds to manufacture and is not a part of it * * * The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce."

This court further remarked in Kidd v. Pearson:

> "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation."

And, remarking that before transportation begins the labor of production is over, this court, in Hammer v. Dagenhart, 247 U. S. 251, said through Mr. Justice Day:

> " 'When the commerce begins is determined not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.' "

In Oliver Iron Mining Co. v. Lord, 262 U. S. 172, the state of Minnesota levied a tax upon the business of mining iron ore equal to 6 per cent of the net value of the ores mined. The court, through Mr. Justice Van Devanter, said:

> "The facts on which the contention rests are as follows: The demand or market within the state for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output is mined to fill existing contracts with

consumers outside the state and passes at once into the channels of interstate commerce. Three-fourths of it is from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. *The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed.* * * * (Italics ours.)

"Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing is a local business, subject to local regulation and taxation. * * *"

In Heisler v. Thomas Colliery Co., 260 U. S. 245, the tax considered was ad valorem upon anthracite coal mined, washed, screened or otherwise prepared for market. Eighty per cent of the product was shipped to other states, which constituted the major market therefor. The court, through Mr. Chief Justice Taft, said:

"We may, therefore, disregard the adventitious considerations referred to and their confusion, and, by doing so, we can estimate the contention made. It is that the products of a state that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation.

"The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty, of exportation of a product or article from a state, determines it to be in interstate com-

merce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from state jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other states at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to states other than those of their production."

In Hope Natural Gas Co. v. Hall, 274 U. S. 284, the activity taxed was that of producing natural gas and the tax measured by a percentage of the gross proceeds derived from sale. The opinion of this court says, as descriptive of the character of activity engaged in:

"The chief business of plaintiff in error is production and purchase of natural gas in West Virginia and the continuous and uninterrupted transportation of this through pipe lines into Pennsylvania and Ohio, where it is sold, delivered and consumed. The corporation owns 3,178 producing wells located in twenty-five counties of West Virginia, from which it took in the year ending June 30, 1925, more than 23 billion cubic feet of gas. And during the same period it purchased from other producers more than 25 billion cubic feet. Most of this passed into interstate commerce by *continuous* movement from the wells." (Italics ours.)

The court has thus disposed of the contentions that production is interstate in character because of continuity of movement, production to fill contractual engagements, dependency upon markets in foreign states, or the established course of business as compelling transportation across state lines. The theory of appellant that generation is inseparable and integral with transmission, distribution and use rests upon the premise that since the energy is transmitted to Utah only upon demand of the receiving device there, and since the generator cannot function to produce electrical energy except as it is demanded and used by the receiving device, the successive steps of generation, transmission and use must be considered as a single unitary operation. From the cases discussed, it is seen that continuity of movement does not compel consideration of generation as interstate, nor the fact that the output is to fill existing contracts. When the consumer opens his switch and thus connects the receiving device, the demand asserted is in effect an act constituting an order upon the company for a desired amount of electrical energy, filled by the company with regard only to the quantitative amount required, which is employed by the consumer in such device or appliance as he chooses. While this court, in the case of Oliver Iron Mining Co. v. Lord, supra, makes the following statement: "Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection

with interstate commerce," it appears that the contractual engagement entered into between appellant here and the consumer is not with reference to generation or production, but merely with respect to delivery to the consumer of the amounts of electrical energy required by him. The consumer makes his demand upon the distribution system and the system supplies such demand without reference, so far as the contract is concerned, to the source of production as in Idaho or Utah, or to production by appellant or by the Idaho Power Company.

Appellant stresses the fact that the output of the generator cannot be stored and thus made subject to subsequent disposition, and that upon a demand being made upon the system by a receiving device, the relationship between generator and device cannot be interfered with except by a complete interruption of the delivery of electrical energy. The question arises as to whether a distinction must be made between this case, where the relationship between production and market has at the time this fixed and absolute quality, and other cases where the relationship is fixed by the established course of business, although not governed by the physical necessities of the character of enterprise engaged in. In frequent instance this court has held that mere physical possibilities, such as opportunity for diversion in transit or storage, are not controlling; but that the character of the enterprise as one of interstate or intrastate commerce will be governed by the established course of business (Lembke v. Farmers Grain

Co., 258 U. S. 50, Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1; Swift & Company v. United States, 196 U. S. 375; Shafer v. Farmers Grain Company, 268 U. S. 189). The established course of business of the Appellant is to transmit the major part of the output of its generators in Idaho to Utah points. The physical necessities adverted to add no additional weight. In LaCoste v. Department of Conservation; Crescent Cotton Oil Co. v. Mississippi, and in Cornell v. Coyne, supra, the entire product was shipped out of the state in regular course of business,—in Oliver Iron Mining Co. v. Lord, supra, all but a negligible percentage; and in the latter two cases under contract requiring such exportation.

We have referred to the function of the transformer as similar to the packaging of goods for shipment. In East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, the appellant was engaged as a public utility in the business of furnishing natural gas to consumers in Ohio. To quote from the decision of this court, speaking through Mr. Justice Butler:

> "During the years in question it obtained approximately 25 per cent of its supply from its own Ohio wells, 72 per cent from the Hope Natural Gas Company of West Virginia, and 3 per cent from the People's Natural Gas Company of Pennsylvania. The West Virginia gas is gathered to a station in that state, there freed from gasolene vapors and pumped at a pressure of from 200 to 300 pounds per square inch into transmission lines which connect, at the boundary between the states, with appellant's high pressure transmission lines.

By means of these the gas is transmitted to a station in Stark county whence it is taken by other lines to pressure reducing stations. The lines there connect with distribution lines in which is maintained pressure of from 30 to 50 pounds per square inch and which are a part of the distribution system in each municipality served. From the latter the gas enters the local supply mains wherein pressure is reduced to that necessary, a few ounces per square inch—to carry the gas through the service pipes extending to the premises of consumers and suitably to supply their burners. *The consumers control the flow of gas on their premises.* The Pennsylvania gas is collected, treated, compressed for transmission, delivered to appellant at the state line and by it transported, relieved of pressure and conducted through such mains and service pipes to consumers' appliances precisely as is West Virginia gas. * * * * *Appellant's contracts with consumers do not specify any source from which it is to obtain gas.* To an extent not disclosed by the record, appellant collects minimum charges for service and charges for readiness to serve without regard to the quantity of gas consumed" (Italics ours).

Discussing the elementary rule that a state cannot lay a tax on an act of interstate commerce, and the rule of Sprout v. South Bend, 277 U. S. 163, "that the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing also from the interstate business," the court held:

"But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmission lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail. * * * * It follows that the furnishing of gas to consumers in Ohio municipalities by means of distribution plants to supply the gas suitably for the service for which it is intended is not interstate commerce but a business of purely local concern exclusively within the jurisdiction of the state."

The furnishing of gas was essentially the furnishing of energy. No change was made in the gas itself by such treatment, but the sole difference was one of pressure and division into smaller streams. To recur to the function and operation of transformers, their primary purpose is to change the voltage, in order to transmission, voltage, as appellant insists, being similar to pressure; and their operation, similar to the packaging of the energy for transmission (State ex rel. Caster v. Flannelly, 96 Kan. 372; West Virginia & M. Gas. Co. v. Towers, 134 Md. 137; Atlantic Coast

Line R. Co. v. Standard Oil Co., 275 U. S. 257; Leisy v. Hardin, 135 U. S. 100).

Appellant stresses numerous cases involving transmission by telephone, telegraph or radio, through the aid of electrical impulses. Their common quality with this case is that each involves electricity. This single similarity does not, however, render these cases authority for the rule here contended for. In the one instance electrical energy is a mere instrumentality of or aid to delivery of an extraneous thing, the message or intelligence transported; in the present case it is in itself the commodity sold and delivered. In Western Union Telegraph Co. v. Texas, 105 U. S. 460, this court said:

> "' ' * * A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods. Both companies are instruments of commerce and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different, but they are both indispensable to those engaged to any considerable extent in commercial pursuits."

The case of United States v. American B. & M. Co., 31 Fed. (2nd) 448, illustrates the same point with respect to the radio, in saying that the "result is the transmission of intelligence, ideas and entertainment. It is intercourse, and that intercourse is commerce."

In the employment of the telephone, the telegraph or the radio, no purpose to deliver to the other end of the line an amount of electrical energy to be used and em-

ployed as the receiver may desire, is sought or attempted. Electrical energy is there employed, not as the thing itself desired, but as a mere instrumentality for the conveyance of the ideas, entertainment or intelligence to be transported. The telegraph company is not a producer of the message which it transmits. Its sole activity is one of transportation and its only engagement to deliver the message filed for sending to the addressee, without alteration or change in the substance thereof. In some of the radio cases cited, emphasis has been placed upon the intimacy of sending device and receiving set and the speed of transmission. It is apparent that these facts are recited and this intimacy established because of the fact that no fixed facilities, such as wires, afford a physical connection between the two devices, and that the point sought by the court in such discussion is the actuality of transportation from sending device to receiving device.

Much emphasis has been placed upon the fact that the kilowatt hour is in course of transit, and, in fact, being used by a receiving device at the time it is being measured. We think this contention disposed of by American Manufacturing Co. v. City of St. Louis, 250 U. S. 459. The tax there in question was a municipal license tax upon the conduct of a manufacturing business in the city, measured by the amount of the sales of goods manufactured in the local factory and whether sold within or without the state. Payment of the tax was not made a condition to selling goods in intrastate, or other commerce, but only to the continued pro-

duction of goods within the City of St. Louis. It was shown that the major part of the output of the factory of plaintiff in error was sold without the state, and that this constituted its established course of business. Payment of the tax was not only measured by sales in interstate commerce, but was postponed until such sales were made. We quote from the opinion of this court delivered by Mr. Justice Pitney:

> "To the suggestion that the tax burdens the mercantile rather than the manufacturing business, because it would be possible for one to manufacture goods to an unlimited extent and pay no tax unless they were sold, or to sell goods and be required to pay the tax although they were not manufactured by the seller, it is sufficient to say—answering the second point first—(a) that, according to the state law as laid down by the court of last resort in this case, a manufacturer has no right to sell goods except those of his own manufacture; and (b) it is not to be supposed that, for the purpose of evading a tax payable only upon the sale of his goods, a manufacturer would pursue the ruinous policy of making goods and locking them up permanently in warehouses. In the outcome the tax is the same in amount as if it were measured by the sale value of the goods, but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods.
>
> "In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or interstate, and only the same

kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the state of Missouri, and hence does not deprive plaintiff in error of its property without due process of law."

Such, as we understand it, is the controlling rule here. We need only to perceive that it is the unit of production by which the tax is measured. If the liability to tax arises only from the intrastate activity and without regard to interstate operations, the state may adopt any reasonable mode of measurement which is fairly based upon or employed as a measurement of the intrastate occupation (Home Insurance Co. of New York v. People of New York, 134 U. S. 594). The record here contains no evidence to the point that the tax is disproportionate to the value of the intrastate activity. In Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, and United Fuel Gas Co. v. Hallanan, 257 U. S. 277, the act by its express terms related solely to oil or gas being transported. Helson v. Kentucky, 279 U. S. 245, may be distinguished because the tax was laid upon the use in interstate transportation (Eastern Air Transport, Inc., v. South Carolina Tax Comm. (United States Supreme Court, [March 14, 1932] No. 504, October Term, 1931).

As said in Western Union Telegraph Company v. At-

torney General of Massachusetts, 125 U. S. 530, in an opinion delivered by Mr. Justice Miller:

> "* * * we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and even in this case, which comes from the circuit court and not from that of the State, we think it should appear that the Corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this Statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other State, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result."

The rule is invoked that: the tax must be imposed solely on account of intrastate business; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without drawing from the interstate business (Sprout v. City of South Bend, supra). The tax here is imposed solely upon and on account of the intrastate business of generating as a manufacturing activity, and is not in anywise increased because of the transmission of energy across state lines. The unit of measurement is the same whether the kilowatt hour be produced for con-

sumption in Idaho or in Utah. The interstate activity of Appellant in Idaho is that of its transmission lines. *That no tax is imposed upon*, or because of, this activity is readily demonstrated by the fact that Appellant is subject to no tax because of its transmission of electrical energy generated by the Idaho Power Company. That Appellant could discontinue its intrastate business without withdrawing from its interstate business, within the meaning of the rule, is shown by such cases as East Ohio Gas Company v. Tax Commission, supra; Hope Natural Gas Company v. Hall, supra; Public Utilities Commission v. Landon, supra. In these cases it has been held that production of gas or oil at the well is taxable by the state; that transmission across state lines is interstate commerce and may not be so taxed, but that distribution within a state of natural gas is to be considered an intrastate activity. In each instance, the facilities for transmission of the product were fixed and established similarly as Appellant's transmission lines limit the transport of electrical energy to those communities reached by such lines. Similarly, the business of the parties in these cases was limited and controlled by contractual engagements. The Hope Natural Gas Company was engaged in production, purchased part of its energy in the form of gas from other producers, and transmitted across state lines in interstate commerce. It could withdraw from the intrastate business of producing only by obtaining all of the product from others, similarly as Appellant might dispose of its generating stations and purchase the entire

amount of its requirements, instead of but a part thereof as at present. The unification of separable occupations into a single system does not compel consideration of the entire operation as unitary so as to deny any separate classification (Hans Rees' Sons v. North Carolina, 283 U. S. 123, 131-2; Bradley v. Richmond, 227 U. S. 477; American Steel & Wire Company v. Speed, 192 U. S. 500; Kehrer v. Stewart, 197 U. S. 60).

That generation and transmission may be conducted by separate companies as separate industrial operations is demonstrated by the fact that Appellant transmits and sells electrical energy which it does not generate, but purchases from the Idaho Power Company; and, in turn, that it generates and transmits energy which it does not distribute to consumers, but sells to municipalities for distribution and sale. In Nevada-California Power Company v. Hamilton, 235 Fed. 317, 326, the court said:

> "The company is engaged in two lines of business: It is a manufacturer and as such its entire business is in California; there it generates all its power. It is also engaged in transmitting to, and selling electric power in, southern Nevada."

GENERATION CONSIDERED AS SEPARABLE BETWEEN AMOUNTS CONSUMED WITHIN AND WITHOUT THE STATE.

The tax involved here is not a property tax, nor attempted to be laid upon the kilowatt hour (Oliver Iron Mining Company v. Lord, supra; Spreckels Sugar Refining Company v. McClain, 192 U. S. 397; American

Manufacturing Company v. St. Louis, supra; Diefendorf v. Gallet, Idaho Supreme Court, January Term, 1932, No. 5859 (March 11, 1932). Nor is it a license tax. While so referred to in the title and act, this designation is not controlling, but its true form will be determined from its substantial operation and effect (Independent School District v. Pfost, '51 Idaho ...., 4 Pac. (2d) 893; Educational Films Company v. Ward, 282 U. S. 379).

In Independent School District v. Pfost, supra, the Idaho Supreme Court held that the legislature had plenary power with regard to taxation, and could impose excise taxes in addition to the property and license taxes specifically referred to in Article VII, Section 2 of the Idaho Constitution; and that where the activity with respect to which the tax was laid was not unlawful in the absence of special permission of the state, it would be considered an excise and not a license tax. "A mere tax imposed upon a business or occupation, therefore, is not a license, unless the levy confers a right or privilege as to the business which would not otherwise exist. * * * A license tax differs from other forms of taxation mainly in that it is imposed as a condition to entering upon the conduct of the business" (id. 896). Applying that test here, no license is required, or issued. The tax is payable, not as a condition to entering upon the conduct of generation, but subsequent to generation and with respect to amounts produced during the preceding month. If the tax be not paid when due certain tax penalties are provided for, but continued

generation is still a lawful act, not punishable in any way. The provision for the issuance of an injunction, if it can be given effect, is a mere attempted aid to collection. (Compare Bowman v. Continental Oil Company, 256 U. S. 642, 647-8, where the tax was required to be paid in advance, and any engagement in the activity without a license first procured was a misdemeanor and punishable by fine or imprisonment.) Nor, as a license tax, could it relate to anything other than the intrastate activity of generating.

That the activity of generation is one of intrastate character appears from the physical facts relating to Appellant's operations. But if it can be held and considered that generation of electrical energy destined for transmission to Utah is interstate in character, the generation of electrical energy sold and consumed in Idaho remains an intrastate occupation. The act makes no express provision for segregation, but it clearly appears that amounts generated, transmitted, or delivered to any point are capable, in practical and commercial operations, of definite ascertainment (supra, page 35). The contention of Appellant that system losses are difficult of computation with respect to delivery to individual consumers is met by the reasoning of the decision in the South Carolina cases (52 Fed (2d) 515, 522):

> "* * * The current generated in South Carolina by the South Carolina Power Company and the current sold by it in that state are measured by its electric meters with absolute accuracy; and the

method adopted in computing the tax on current brought in and sold is to add the total kilowatt hours coming into South Carolina (37,450,000) to the number generated in South Carolina (40,000,000); and from this total (77,450,000) compute the line loss (14,760,339 or 19 per cent.). This percentage of loss is applied on the current coming into the state which gives the line loss on this current (7,115,500). This is subtracted from the current brought into the state; and the result (30,354,500) represents the amount of current brought into the state and sold. It is objected that there is no average of transmission loss; but the method adopted would seem to be reasonably fair and accurate, as much so, at least, as most methods in use for computing taxes on the profits of business, which are universally upheld. *If absolute accuracy in matters of this sort were necessary to the validity of taxes, most modern taxing systems would be found invalid.*" (italics ours)

This rule is sustained by Peoples Natural Gas Company v. Public Utilities Commission of Pennsylvania, 270 U. S. 550, where this court said that after the commingling of gas from the two sources:

"* * * the two are indistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practical purposes the two are separable and neither affects the character of the business as to the other. Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265, 66 L. ed. 227 * * *."

In St. Louis S. W. R. Company v. Arkansas ex rel. Norwood, 235 U. S. 350, a similar question of separability being considered, this court said:

"But the state court has not as yet construed the section as calling for the forfeiture of the privilege of doing interstate business in the event of nonpayment of the franchise tax; nor is the state here insisting upon such a construction. The present is an ordinary action to collect the tax as a debt, and not to forfeit the franchise for its nonpayment. Non constat but that the state court will hold, when confronted with the question, that the franchise to be forfeited pursuant to sec. 20 is confined to intrastate commerce. Such a construction is clearly foreshadowed by what the court has in this case held with respect to the general purpose of the act. And in exercising the jurisdiction conferred by sec. 237, Judicial Code (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, sec. 1214), it is proper for this court to wait until the state court has adopted a construction of the statute under attack, rather than to assume in advance that such a construction will be adopted as to render the law repugnant to the Federal Constitution. * * *"

(Michigan Central R. R. Company v. Michigan Railroad Commission, 236 U. S. 615, 635; Ohio Tax Cases, 232 U. S. 576, 591; Plymouth Coal Company v. Pennsylvania, 232 U. S. 531, 546.)

Nor may we overlook the well established rule to which the court then proceeds:

"* * * No canon of construction is better established or more universally observed than this: that if a statute will bear two constructions, one within and the other beyond the constitutional power of the lawmaking body, the courts should adopt that which is consistent with the Constitution, because it is to be presumed that the legislature intended to act within the scope of its authority. * * *"

(Hindman v. Oregon Short Line R. R. Company, 32 Idaho 140; State v. Grimmett, 33 Idaho 203).

The statement of Appellant that it cannot be considered that the legislature clearly intended to tax the 84 per cent of the electricity (generated by Appellant) used in Utah, "yet it also intended and devised some method to tax the relatively small amount used in Idaho if the tax on Utah use should fail" assumes without color of warrant from the record therefor that the greater part of the total amount of electrical energy generated in Idaho is transmitted to without the state. Such is not the case.

POINT II.

SECTION 5 OF THE TAX CREATES AN EXEMPTION AND NOT A SUBSIDY. AS SUCH IT DOES NOT DENY APPELLANT EQUAL PROTECTION OF THE LAWS NOR DEPRIVE IT OF PROPERTY WITHOUT DUE PROCESS; NOR DOES IT LEVY A TAX FOR OTHER THAN A PUBLIC PURPOSE IN VIOLATION OF SECTION 2 OF ARTICLE VII OR SECTION 2 OF ARTICLE VIII OF THE CONSTITUTION OF IDAHO; NOR LEVY A TAX FOR THE BENEFIT OF IRRIGATION DISTRICTS IN VIOLATION OF SECTION 6 OF ARTICLE VII OF THE CONSTITUTION OF IDAHO.

Summary.

(a) With respect to the Constitution of Idaho the

language of Section 5 is held to create an exemption and not a subsidy. It does not lend the aid or credit of the state (Williams v. Baldridge, infra).

(b) As a public utility Appellant is entitled to only a just and reasonable return. Its rate structure is not involved in this suit, and the effect of Section 5 with respect thereto is beyond the purview of this inquiry and without the evidence. Unless it imposes a rate that is non-compensatory the Tax Act is not wanting in due process because of Section 5.

(c) The exemption made by Section 5 is a permissible classification. It affects alike all who are similarly situate, and therefore does not deny equal protection. Appellant is not the proper party to claim a discrimination against irrigation uses in Utah.

(d) If the section were unconstitutional it is severable from the remainder of the act. If we delete the exemption, the remainder of the act is workable.

Argument.

Section 5 of the Tax Act is assailed upon the ground that it is wanting in due process and denies equal protection in that it compels the payment of money by Appellant for the benefit of private individuals; and that it levies a tax for the benefit of individuals and irrigation districts in violation of the Constitution of Idaho. We are thus required to examine this section with a view of ascertaining whether its effect and operation is to provide for the payment of a subsidy by Appellant to private persons or whether it serves only to create

an exemption from the tax burden otherwise indirectly imposed.

The question thus propounded is resolved by the state court in the case of Williams v. Baldridge, 48 Idaho 618. The pertinent parts of the statutes there in question read as follows:

"Section 3099. The following property is exempt from taxation: * * *

"15. Property used for generating and delivering electrical power to the extent that such property is used for furnishing power for pumping water for irrigation purposes on lands in the State of Idaho. This exemption shall accrue to the benefit of the consumer of such power except in cases where the water so pumped is sold or rented to irrigate lands, in which event the property used for generating and delivering power shall be assessed for taxation to the extent that such water is so sold or rented.

"Section 3099A. The state Board of Equalization shall, at the time of assessment of the property of any electrical public utility, determine the amount of the exemption under subdivision 15 of Section 3099 and shall reduce such assessment so that any such electrical public utility shall not be required to pay any taxes upon that portion of its property so exempted.

"The amount of such exemption or reduction by the State Board of Equalization shall be as nearly as practicable, such as would yield the amount of taxes included in the rates of the utility under the schedules applicable to the furnishing of such power.

"The full amount of taxes which would have been due from such utility if such exemption had not been made, shall be credited annually for the year in which the exemption is made on the power

bill to the consumer by the utility furnishing such power in such sum as the amount of power each consumer uses bears to the whole amount of power furnished by the utility for irrigation purposes * * *."

Suit was instituted by taxpayers to enjoin the members of the State Board from allowing to the Idaho Power Company any exemption from taxation under the provisions of such statutes (Compiled Statutes of Idaho, Section 3099, as amended, and Section 3099-A, as enacted, by Session Laws of Idaho, 1921, Chapter 106) on the ground that said statutes violated the Constitution of Idaho in that they extended and loaned the aid and credit of the state to private individuals in the nature of a subsidy. It was held that the effect of such a statutory provision was to create an exemption and not to loan the aid or credit of the state to private individuals, nor to create a subsidy. In response to the contention here advanced by appellant that the situation is the same as though the tax had been collected and returned the court remarked that the same argument could be made against every tax exemption allowed, but that the Constitution explicitly directing and contemplating that the legislature might grant exemptions should not be construed to prevent what it allows.

Adverting to the rule which obtains in this state that the power of the legislature to allow exemptions from taxation is plenary, it was considered by the court that the classification made was permissible in that the necessity of irrigation to the people and the welfare of

the state compelled recognition of the expense attendant upon pumping water for irrigation, and the propriety of action seeking to make available for settlement lands otherwise unfit for cultivation, and remarked that it was not unreasonable for the legislature to attempt to equalize the burden of applying water to irrigation projects as between gravity and pumping conveyors. The opinion says in part:

> "It was the intention that the benefit of such exemption should accrue immediately to the consumer of power. This was to be accomplished by a credit on the account of each user of any electrical energy produced, the amount of such credit to be determined annually by the Public Utilities Commission. This provision does not alter the status as an exemption statute. Always the effect and often the purpose of exemption statutes is to grant a subsidy. Nor is it always true that the incidence of the subsidy is immediate. The savings effected by the exemption are often passed on to others. A tax exemption to an educational institution inures to the benefit of the students in lessened tuition charges. Therefore the mere fact that the statute outlines a method for carrying into effect that which under ordinary conditions would have taken place anyway—that is, the transfer of the ultimate benefit of the exemption to the consumer—does not change its character as an exemption statute or require us to hold that it grants a subsidy to private individuals in a manner forbidden by the Constitution.
>
> "The fact that the exemption benefits irrigation rather than the power company, instead of making the act unconstitutional, is probably the only reason which justifies the exemption. * * *".

The substantial identity of language of the two statutes leads inevitably to the conclusion that Section 5 of the act here considered was adopted from the 1921 Act and in the light of such construction thereof. Thus viewed, the legislature was plainly intending the language employed to provide only for a valid exemption and the construction of such language by the state court effectually disposes of the objection made that it offends Articles VII and VIII of the Constitution of Idaho. We are then relegated to a consideration of whether this provision deprives Appellant of property without due process of law, or compels the appropriation of money by Appellant for the benefit of private individuals or irrigation districts—a point reserved from decision in the state case above considered because the proper parties were not before the court.

The purpose of the section being to protect irrigation users from higher rates because of the tax, to be held as violative of these latter constitutional provisions it must be considered that the effect of the exemption is to alter or change a rate or charge fixed by Appellant, and that the state is wanting in power so to do; or that it compels a non-compensatory rate which, in connection with other rates charged, will not yield to Appellant a just return upon its investment and therefore denies due process within the meaning of the rule set forth in San Diego Land Co. v. National City, 174 U. S. 739, 754 (Idaho Power Company v. Thompson, 19 Fed. (2d) 547). The inhibition of Section 13 of Article I of the Constitution of Idaho is of no greater force than

the Fourteenth Amendment of the Constitution of the United States, which does not operate to deprive the states of their lawful power and of the right to resort to reasonable methods inherently belonging to the power exerted, but the provisions of the due process clause only restrain those arbitrary and unreasonable exertions of power which are not really within lawful state power since they are so unreasonable and unjust as to impair or destroy fundamental rights (American Land Co. v. Zeiss, 219 U. S. 47).

We are not involved here in a rate hearing, and the present suit is not to be confused with a determination of whether, under the provisions of the Tax Act, Appellant will be allowed a fair and reasonable return upon its capital investment; nor does the record disclose or Appellant attempt any showing as to its operation in this regard. The sole interest of the exemption is to prevent the imposition of a higher rate for pumping because of this tax, the provision for credits upon the power bills of consumers is to effectuate that purpose and insure its operation, and in practical operation its effect does not extend beyond such purpose. It is not urged that this protection of pumping rates is discriminatory, nor that it provides a rate that is confiscatory, nor was evidence offered in support of either premise.

The position of the Appellant in this regard is tenable only if it be assumed that the producer is entitled to charge and receive such rates for electrical energy furnished for pumping water for irrigation purposes in Idaho, as presently in effect, or such as it may de-

sire to establish. The generation and sale of electrical energy in Idaho by appellant company is in the capacity of a public utility (R. 1). Considering, then, whether the effect of Section 5 is to accomplish a purpose with regard to which the state is without warrant or authority, or to impose a regulation incommensurate with the law of the land, we are required to determine if the right of Appellant as a public utility to a return upon its investment is extended to such sum as it may be able, in the absence of all regulation, to procure from its operations. The exemption assailed relates only to intrastate business and has regard only to electrical energy furnished for pumping water for irrigation purposes in Idaho by Appellant as a public utility. The subject is one of proper regulation by the state, subject only to the limitations imposed by the constitutional provision that a confiscatory rate must not be required. Pursuant to such authority the state has provided by statute for the establishment of such rates by Appellant as will yield a reasonable return (Idaho Power Company v. Thompson, supra).

In the absence of such regulatory statutes, however, the rule must be the same, in that Appellant's rates would be: (a) subject to the same limitations under the common law rule, (Munn v. Illinois, 94 U. S. 113; Dow v. Beidelman, 125 U. S. 680; Water Works v. Schottler, 110 U. S. 347; Cincinnati H. & D. R. Company v. Village of Bowling Green, 57 Ohio St. 336), or (b) without restriction, so that the utility is enabled to establish its own rates. The use by Appellant of its property in

Idaho is such as to vest an interest therein in the public. The statutory provision for supervision does not constitute the establishment of a new regulation, but provides merely for the administration of one already existing. Both reason and authority deny to a corporation clothed with such rights and powers and bearing such relation to the public the power to arbitrarily fix the rates at which it will furnish electrical energy to those who desire to use it (Cincinnati H. & D. R. Company v. Village of Bowling Green, supra).

The rule has long been incorporated in our common law. In Munn v. People of Illinois, supra, this Court quoted in part the decision in Allnutt v. Inglis, 12 East, 527, decided in 1810, in which the Court quoting Lord Ellenborough said:

> " 'There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the Warehousing Act with the Act by which they were originally constituted, and with the actually existing state of things in the Port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts

upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf.' "

In Dow v. Beidelman, this Court said:

"In Munn v. Illinois, 94 U. S. 113 (24:77), decided at October Term,1876, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the Legislature 'to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable,' the Chief Justice said; 'To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.' "

The public has a right to be exempt from unreasonable exactions, and the interest of the corporation is not the sole test of suitable rates (Smyth v. Ames, 169 U. S. 466). And the reasonableness of local rates must be determined without reference to interstate business (Id., Northern Pacific Railway Company v. North Dakota, 236 U. S. 585, 600). The scope of the Fourteenth Amendment to the Constitution of the United States and the meaning of due process do not extend to a prohibition against a statute that may operate, directly or

indirectly, to diminish the returns that Appellant would otherwise receive, but merely to lay a restraining hand upon the imposition or establishment of such rates as would deny to Appellant an unreasonable return. In Dayton-Goose Creek Railway Company v. United States, 263 U. S. 456, 481, this Court said:

> "Second. The carrier owning and operating a railroad, however strong financially, however economical in its facilities, or favorably situated as to traffic, is not entitled, as of constitutional right, to more than a fair net operating income upon the value of its properties which are being devoted to transportation. By investment in a business dedicated to the public service the owner must recognize that, as compared with investment in private business, he cannot expect either high or speculative dividends, but that his obligation limits him to only fair or reasonable profit."

If the legislature sees fit to adopt regulatory statutes, it withdraws the matter from private controversy, but if the legislature has taken no such action the situation remains unchanged in that the public utility is still limited in its charges to such as are just and reasonable. With this premise, we have no difficulty in observing that in the absence of a showing that the return permitted to it under the statute assailed will not be fair and reasonable as compensation for the use of its property, the Appellant can claim no pecuniary injury nor show that it is thus deprived of earnings or profits to which it would be otherwise entitled; nor does it appear that the Appellant is or will be unable to fully protect its property rights and interests by such adjust-

ment of its rates, if any should be required, as will afford to it a just and reasonable profit. In New York ex rel. Woodhaven G. L. Company v. Public Service Commission, 269 U. S. 244, 249, it was said, in an opinion delivered by Mr. Justice Butler:

> "This case is to be distinguished from a suit to restrain the enforcement of legislation prescribing a confiscatory rate. Here, the rate is not involved. The order directs the extension; it does not deal with compensation. The commission reasonably might assume that the company will take appropriate steps to save its property from confiscation * * * . There is nothing to show that just compensation for the service ordered may not be had, or that compliance with the order will necessarily so reduce the company's income from its operations as a whole as to be in effect a confiscation of its property * * *."

On page 69 of Appellant's Brief, the suggestion is offered that this exemption feature, if it would be otherwise valid, results in a denial of due process and equal protection in that a similar exemption is not extended where the electrical energy is used for irrigation purposes in Utah. So far as this concerns a discrimination to users offensive to due process or equal protection Appellant is not a proper party to raise the suestion. The exemption is not made for the benefit of Appellant and no pecuniary injury flows to it from such circumstance. With respect to the commerce clause, this point is not comprehended by the pleadings, wherein no discrimination is alleged as to interstate commerce by the provisions of section 5, nor any pumping use in Utah, and

was not urged in the court below (Pierce Oil Company v. Hopkins, 264 U. S. 137) and is not responsive to any assignment of error.

SECTION 5 IS SEVERABLE FROM THE REMAINDER OF THE ACT

If it were conceded that the exemption provision of Section 5 is invalid, no basis arises for the claim that the entire act must therefore fail. The Supreme Court of Idaho held in Gillesby v. Board of County Commissioners, 17 Idaho 586.

> " 'The Court is not warranted in declaring the whole statute void, unless all the provisions are connected in subject matter, depend on each other, were designed to operate for the same purpose, or are otherwise so dependent in meaning that it cannot be presumed that the legislature would have passed one without the other. The constitutional and unconstitutional provisions may even be expressed in the same section, or even in the same sentence, and yet be perfectly distinct and separable, so that the first may stand though the last fall.' "
>
> Knight v. Trigg, 16 Idaho 256.
> State v. Mulkey, 6 Idaho 617.
> In re D. C. Abel, 10 Idaho 228.

This rule is universal in its application and has been repeatedly enunciated by this court.

In Field v. Clark, 143 U. S. 649, after holding a provision in a federal tariff bill unconstitutional, but refusing to accept the contention that the whole act was thereby invalidated, Mr. Justice Harlan said:

"Unless it be impossible to avoid it, a general revenue statute should never be declared inoperative in all its parts because a particular part relating to a distinct subject may be invalid. A different rule might be disastrous to the financial operations of the government, and produce the utmost confusion in the business of the entire country."

Particular force is given to this doctrine in the consideration of revenue measures. The rule is eloquently expressed by the Court in People v. Knapp, 230 N. Y. 48; 129 N. E. 202, 207:

"Thus viewing it, I cannot doubt that the exclusion of interest on intangibles will leave the essence of the scheme intact. I find it unbelievable that a legislature willing to impose a tax with those items in, would be unwilling that the tax should stand if those items were out. Undoubtedly it wished them in, if it had the legal right to keep them. To say that does not mean that, rather than lose them, it would throw the project to the winds. Laws are not to be sacrificed by courts on the assumption that legislation is the play of whim and fancy. A doctrinaire emphasis on the possible rather than the probable would forbid severance at all times. No doubt it is easy, sheltering ourselves behind some implacable tenet of the separation of governmental powers, to insist upon a certainty impossible of attainment. We do small service to the state by so intransigent a pose. Our right to destroy is bounded by the limits of necessity. Our duty is to save, unless in saving we pervert. * * * I will not readily impute a desire to place the revenues of the state in jeopardy by the sacrifice of the whole, whenever there is failure of a part."

Weller v. New York, 268 U. S. 319.
State of Washington v. Parmenter, 50 Wash. 164.

Adams v. Standard Oil Co., 97 Miss. 879.
Smith v. Wilkins, 164 N. C. 135.
Brazee v. Michigan, 241 U. S. 340.
State v. Elba Bank & Trust Company, 18 Ala. App. 253.
Johnson v. Long Furniture Company, 113 Miss. 373.

The case would seldom arise where an exemption could be deleted without leaving a workable act.

> "An exemption, which was invalid, was alone taken from it. It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other—as when the two things provided are necessary parts of one system—that the whole Act will fall with the invalidity of one clause."

Little Rock etc. Ry. v. Worthen, 120 U. S. 97.
Florida Cent. R. Co. v. Schutte, 103 U. S. 118.
St. Louis Southwestern Ry. Co. v. Arkansas, ex rel. Norwood, 235 U. S. 350.
Berea College v. Kentucky, 211 U. S. 45.
Fairley v. City of Duluth, 150 Minn. 374.

Section 11 of the Act provides that if any part thereof be judged invalid such adjudication shall not affect the validity of the remainder of the act. Although this Court has held a like provision not an inexorable command (Dorchy v. Kansas, 264 U. S. 286), it is nevertheless given weight by the courts (Weller v. New York, 268 U. S. 319), and the rule is well expressed in State v. Clausen, 65 Wash. 156, where the court said:

> "Anything the legislature could have eliminated

itself and left an operative act can be eliminated by the courts without destroying the entire act, if it is the will of the legislature that the remaining parts of the act shall stand after such elimination."

In Williams v. Standard Oil Company, 278 U. S. 235, this Court, speaking through Mr. Justice Sutherland, said that the effect of such a declaration as contained in Section 11 of this act is to create the presumption of separability:

> "That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remains."

It is urged that the failure of the legislature in regular session to enact a tax bill there introduced as House Bill No. 44, which was similar to that here considered except that it did not include the provisions of Section 5, manifests that without the inclusion of Section 5 the act would not have passed. The bill so introduced in regular session did not come to final vote, but was withdrawn by its sponsors (R. 101). Whether House Bill No. 44 would have passed if pressed to final vote is a matter of conjecture and courts will not resort to speculation as to the purpose of the legislature in order to defeat an act; nor may the proclamation of the governor be considered in an attempt to discern the motivations which governed the action of the legislature. The

oft repeated declaration of the state court that an act will not be declared unconstitutional unless the invalidity appears beyond a reasonable doubt (Chambers v. McCollum, 47 Idaho 74; In re Edwards, 45 Idaho 676), is to be considered as embracing within its reason and scope, the question of whether an entire act must fail because some provision thereof must be deleted.

POINT III

THE TAX ACT IS IN CONFORMITY WITH SECTION 16 OF ARTICLE III OF THE CONSTITUTION OF IDAHO—IN THAT THE ACT EMBRACES BUT ONE SUBJECT AND MATTERS PROPERLY CONNECTED THEREWITH, WHICH SUBJECT IS EXPRESSED IN THE TITLE.

Summary.

(1). The single subject contained in the act is the tax here in question, since an exemption from the tax is but a restriction or qualification of the levy, and naturally and inherently germane thereto. The state court has construed the language of section 5 of the act to create a mere exemption and not a subsidy (Williams v. Baldridge, supra).

(2). The tax imposed is measured only by electrical energy generated for barter, sale, or exchange, as expressed in the title.

Argument.

Section 16, Article III, of the Constitution of Idaho, provides:

> "Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. * * *"

An able discussion of this constitutional provision is set forth in Pioneer Irrigation District v. Bradley, 8 Idaho 310, as follows:

> " 'If the provisions of a statute all relate directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title, it is permissible to unite them in the same act. The objections should be grave, and the conflict between the constitution and statute palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraces more than one subject.' * * * 'Provisions of an act may be numerous; but, however numerous, if they can be, by fair intendment, considered as falling within the subject matter of legislation, or necessary as ends and means to the attainment of the subject, the act will not conflict with the constitution.' * * * * * * it was not intended to obstruct honest legislation, or to prevent the incorporation into a single act of the entire statutory law upon one general subject.' "
>
> State v. Dolan, 13 Idaho 693; Hailey v. Huston, 25 Idaho 165; Kessler v. Fritchman, 21 Idaho 30; State v. Banks, 37 Idaho 27; State ex rel Taylor v. Mirabel, 33, New Mexico 553).

Before further considering the above contention of plaintiff, we desire to point out that the prohibition in

the constitution is against a legislative enactment containing more than one *subject* and not against it containing two or more objects (State ex rel. Taylor v. Mirabel, supra). Both the alleged subjects have to do with the tax. The application of the credits on the power bill of a consumer is simply the means for carrying out the exemption, and consequently sufficiently germane to be included in the same act. Bearing in mind that the constitutional requirements are met "if the provisions of a statute * * * have a natural connection, and are not foreign to the subject expressed in the title," the act properly contains all the law in the State of Idaho on the general subject of a tax on the generation of electrical energy. Eliminate the tax and no reason appears for the exemption. Without the exemption, the provision for application of credits on the power bill of the consumer is rendered nugatory. We need only to apply the test set forth in Utah Mortgage Loan Corporation v. Gillis, 49 Idaho 676, cited by appellant, of deleting one claimed subject from the act and determining whether the balance constitutes an independent subject. The facts are dissimilar to State v. Banks, Hailey v. Huston, or Utah Mortgage Loan Co. v. Gillis, cited by appellant.

The next contention is that the act contains a subject is not expressed in the title, in that by the title the tax is levied on electricity and electrical energy generated, manufactured or produced for barter, sale or exchange whereas the act levies upon the producer of electrical energy for barter, sale or exchange, a tax measured by

all kilowatt hours generated, manufactured or produced by him. The pertinent parts of the title and act are as follows:

> "An act levying a license tax * * * on electricity and electrical energy generated, manufactured or produced in the State of Idaho for barter, sale or exchange. * * *"

Section 1 provides in part as follows:

> "* * * each and every individual, firm, * * * engaged * * * in the generation, manufacture or production of electricity and electrical energy in the State of Idaho * * * for barter, sale or exchange, shall * * * pay a license tax of one-half (½) mill per kilowatt hour on all such electricity and electrical energy so generated, manufactured or produced, measured at the place of production * * *."

Section 11 of the act requires the producer to pay the tax on "such electricity and electrical energy so generated" and the only producer required to pay the tax is one who generates for barter, sale or exchange. Were plaintiff generating solely for its own use, it would not come within the legislative classification of those required to pay the tax. Plaintiff concedes that the title refers only to electrical energy produced for barter, sale or exchange. By reference, therefore, to either the forepart of Section 1 or the title of the act, "such electricity and electrical energy so generated, manufactured or produced," can only be held to include that which is generated for barter, sale, or exchange (Opinion Statutory Court, R. 31-32).

The general rule for the guidance of the courts in interpreting a statute is that the court may take into consideration the reason for the law, the object and the purpose thereof in contemplation of the legislative body (State v. Bowman, 40 Idaho 470; Weaver v. Rambow, 37 Idaho 645; Rural H. S. Dist. No. 1 v. School Dist. No. 37, 32 Idaho 325).

The title of an act may not control the plain language of the enacting clauses, we may look to the declared scope and purpose of the act as evidenced by its title whenever it becomes necessary in view of the use of language incapable by itself of exact construction (White v. United States, 191 U. S. 545; State v. Paulsen, 21 Idaho 686; Curoe v. Spokane Etc. R. R. Co., 32 Idaho 643; Church of Holy Trinity v. United States, 143 U. S. 457; Coosaw Min. Co. v. South Carolina, 144 U. S. 563).

In Coosaw Mining Company v. South Carolina (supra) this court said:

> "While express provisions in the body of an Act cannot be controlled or restrained by the title or preamble, the latter may be referred to when ascertaining the meaning of a statute which is susceptible of different constructions. In United States v. Fisher, 6 U. S. 2 Cranch 358, 386 (2: 304, 313) Chief Justice Marshall said: 'Neither party contends that the title of an Act can control plain words in the body of that statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the Legislature it seizes everything from which aid can be derived;

> and in such case the title claims a degree of notice, and will have its due share of consideration.' United States v. Palmer, 16 U. S. 3 Wheat, 610, 631 (4: 471, 477). This rule is especially applicable in states whose constitutions, like that of South Carolina, provide that 'every Act or resolution, having the force of law, shall relate to but one subject, and that shall be expressed in the title.' "

The amount of tax accruing under Section 1 is limited by the expression in the title. In State v. Pasta, 44 Idaho 671, the state court said:

> "The object of the title of an act is to give a general statement of the subject matter contained therein, *and the act must not be so construed as to extend its effect beyond the limits fixed in the title.*

Had the legislature intended to tax all electrical energy regardless of the purpose for which it is produced, no reason could appear for inserting the phrase "for barter, sale or exchange" in the title and requiring by Section 1 only producers of electrical energy for barter, sale and exchange to pay the tax? If any ambiguity exists, it arises from the term "such electricity * * * so generated * * *." The title must then be consulted to determine the scope and meaning of the phrase and "the act must not be so construed as to extend its effect beyond the limits fixed in the title." If a statute is susceptible of two constructions, one which would uphold it, and the other render it unconstitutional, the former should be adopted and the doubt resolved in favor of the validity of the act (Smallwood v. Jeter, 42 Idaho 169; Griffith v. Owens, 30 Idaho 647).

Appellant then insists that the act is broader than the subject expressed in the title because the exemption includes line losses while the title exempts only the energy actually used for pumping water for irrigation purposes. The title in this respect provides that the electrical energy actually used for pumping shall be exempt and the exemption accrue to the benefit of the consumer.

The first portion of Section 5 is identical in import and practically so in language. Both title and act, in referring to the exemption, use the expression "such electricity and electrical energy" which can only refer to electricity and electrical energy used for pumping water for irrigation purposes. The second proviso, in Section 5, reads as follows:

> "Provided further that the full amount of such license tax which would have been due from such producers of electricity and electrical energy, if such exemptions had not been made, shall be credited annually for the year in which the exemptions are made on the power bill to the consumer by the producer of such electricity and electrical energy, furnishing such power * * *."

This proviso clearly refers to credit being given for tax exempt electrical energy, identically the same amount set forth in the title and the forepart of Section 5. This fact is made clear by the use of the expression "*such license tax* which would have been due * * *." "Such license tax" and "such exemption" can only refer to the identical amount set forth in Section 5 and in the title as exempt. The second proviso is simply the

means of carrying into effect the identical exemption; the title sets forth the topic and the act treats it.

In State v. Dolan, 13 Idaho 693, the State Supreme Court said:

> "It (the title) plainly indicated the object and purpose of the act, which is all the constitution requires. The subject of a statute is one thing and its detailed provisions quite another; one is the topic, the other its treatment; one is required to be stated in the title, the other is not."

Quoting from Turner v. Coffin, 9 Idaho 338, the court further said:

> "It seems to have been generally recognized by the authorities as the intention of the framers of such a constitutional provision to require a title sufficiently definite and comprehensive as to indicate to one reading it the general scope and purpose of the legislation intended by the act, and that if the title be sufficient for that purpose it will be held as including all necessary and incidental legislation necessary to make the general purpose of the act operative."

Appellant's contention of a difference in the quantity of energy "actually used" and that taxable at the place of production assumes that the act will be construed to provide a greater credit than exemption. If the language of the act considered does not compel such a construction the point asserted is without merit.

> "Anyone reading the title would be advised of the proposed legislation; no one could be deceived or misled as to what the legislature intended to do in a general way. It does not conceal or cover up

> any secret intent of the legislature. * * * A reasonable and common-sense construction must be given to this act, and when such construction is placed upon it we readily see what the legislature intended by the title and the provisions of the act" (State v. Dolan, supra).

A common-sense construction of the title and Section 5 repels the conclusion that the legislature intended the credit of the exemption to be any greater than the amount of the tax accruing had the exemption not been made. The question arising from system losses will be discussed under Point IV, infra.

POINT IV

THE TAX IS NOT SO UNCERTAIN AS TO REQUIRE ARBITRARY ADMINISTRATIVE ACTION AND THUS TAKE APPELLANT'S PROPERTY WITHOUT DUE PROCESS OF LAW, BUT PROVIDES AN ADEQUATE STANDARD FOR THE COMPUTATION OF THE TAX.

Summary.

(a) The act provides that the tax shall be measured only by kilowatt hours generated or produced for barter, sale or exchange in the operation of Appellant's system. The amount of electrical energy generated for this purpose is ascertainable, and the basic measurement must be made at the place of production.

(b) The act is sufficiently definite where for reasons found to result either from the text of the statutes

involved or the subjects with which they deal, a reasonable standard was afforded (Mahler vs. Eby, 264 U. S. 32; United States vs. Brewer, 139 U. S. 278, 288; Miller vs. Strahl, 239 U. S. 426, 434; Nash vs. United States, 229 U. S. 373; Omaechevarria vs. Idaho, 246 U. S. 343).

(c) The exemption provided by Section 5 may be definitely determined where, as here appears, amounts generated, delivered to consumers, used by Appellant, or lost in transit, may be readily computed.

Argument.

That the Act provides for measurement of the tax only by amounts of electrical energy generated for barter, sale or exchange is, we think, suficiently discussed under Point III, supra. The Act provides for the installation of meters and the payment of a tax on electrical energy "measured at the place of production." The provision emphasizes the intent to tax only production and not transportation or sale; and insures the basic measurement required. That in order to an ascertainment of amounts generated "for barter, sale or exchange," other data may be required, is not offensive to the purpose served by such provision under the statute. Having manifested its intent not to include in the basis of measurement any amounts generated by the producer for its own use and not for sale, the legislature must be considered to have contemplated the fact that gross output was not the factor to be used, and the resultant necessity of further computations. No

other construction is permissible, and thus viewed, no ambiguity exists. In every phase of its operations Appellant can compute exact amounts. The Bill of Complaint pleads amounts generated, sales in Idaho, transmission, etc., losses pertaining to business in Idaho and station use in Idaho (R. 4). Appellant can definitely ascertain amounts delivered to any point on its system or losses between any points (Mr. Hale, R. 173-4; Dr. Magnusson, R. 201; Mr. Rupp, R. 211). The question of whether the tax is measured only by electrical energy generated for barter, sale or exchange is one of law rather than fact. It is not, therefore, left to the discretion of the Commissioner nor subject to arbitrary interpretation by him. The suggestion made that the state must thus go beyond its territorial jurisdiction in obtaining the data necessary for such computation is answered by this Court in American Manufacturing Company v. St. Louis and Hope Natural Gas Company v. Hall, where the tax could not be assessed until there had first been ascertained the amount of receipts from sales made by the taxpayer both within and without the state.

In Adams v. Greene, 182 Ky. 504, the court said:

> "A statute will not be held void for uncertainty if any sort of practical or sensible construction may be given it. Mere difficulty in ascertaining its meaning, or the fact that it is susceptible of two interpretations will not render it nugatory * * *"

(State ex rel. Toomey v. State Board of Examiners, 74 Mont. 1; Waters-Pierce Oil Company v. Texas, 212

U. S. 86; Alaska Pacific Fisheries v. Territory of Alaska, 236 Fed. 70, affirmed 242 U. S. 648.)

In State v. Livingston Concrete Bldg. & Mfg. Company, 34 Mont. 570, the court said:

> "While it may be conceded that the intention of the lawmakers might have been expressed in plainer terms, we cannot hold a solemn legislative enactment of no force or effect because of the indefinite language in which it is couched, unless we find ourselves unable to divine the purpose or intent of the legislature. * * * For, after all, the function of the court is to determine and make known, if possible, such purpose or intent; for the intention of the legislature is the essence of the law. * * *"

A similar construction, as adopted by the state court in State of Idaho vs. Omaechevarria, 27 Idaho 797, was sustained by this court in Omaechevarria vs. Idaho, 246 U. S. 343, where it was held that:

> There is no such indefiniteness in the provisions of Idaho Rev. Codes 1908, sec. 6872, making criminal the grazing of sheep on the Federal public domain on ranges previously occupied by cattle, or usually occupied by cattle raisers, as to render such statute repugnant to the constitutional guaranty of due process of law, although it fails to provide for the ascertainment of the boundaries of a range, or for determining what length of time is necessary to constitute a prior occupation a usual one within the meaning of the statute, — especially since it is provided by sec. 6314, that in any crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence.
>
> (Hygrade Provision Company v. Sherman 266 U. S. 497, 502.)

In Standard Oil Company v. Brodie, 153 Ark. 114 (followed in Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 139), the court had under consideration a tax act, Section 1 of which provides that all persons selling gasoline to be used by the purchaser in propelling motor vehicles over the highways should collect from the purchaser in addition to the usual charge the sum of one cent per gallon, and in response to a contention similar to that urged here, the court said:

> "Finally, it is argued that the law is vague and uncertain—so much so that it is incapable of enforcement. The interpretation, which we have given to the statute, and which, we think is a fair and reasonable one, relieves it from this charge of uncertainty, for we think that it means what we have stated in this opinion, and that it can be readily understood.
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> "The fact that there may be be a difference of opinion as to the meaning of the language of a statute does not render it too vague or uncertain to be enforceable. It is not infrequent that statutes have to be construed by the courts before laymen, or even lawyers, have a settled view as to the proper interpretation, but a statute which is fairly susceptible to definite interpretation is not too vague for enforcement."

A construction of the Commissioner is not ground for enjoining any enforcement of the Act. If the Act shall be construed to mean that amounts of electrical energy consumed in energizing the system are not to be included in the factor by which the tax is measured, the tax is still ascertainable; an adequate standard is afforded. The assertion that ascertainment of losses with respect

to energy delivered to that part of the system located in Utah and energy originating in Utah is mathematically insolvable disregards the essential fact that system losses or system uses are determinable with an accuracy that satisfies the requirements of the statute and protects the interests of Appellant. That, in the common assessment of ad valorem taxes, the assessor is not infallible and cannot be expected to know or be able to ascertain with exactness the full cash value of every parcel of property has never been considered to vitiate the tax. Nor is this ground of contention consonant with the averment of precise amounts of "transmission, distribution and sub-station losses pertaining to business in Idaho" (R. 4). When considered in connection with the fact that "there is normally in the aggregate an excess of capacity in the local Idaho station over the Idaho demand" (Mr. Hale, R. 166) and that "the flow of power generally was into Grace Station from Idaho Falls, rather than out of Grace Station toward Idaho Falls" (Mr. Cheever, R. 146), the conclusion is warranted that although amounts of energy destined for the Utah system are commingled with amounts generated for Idaho users, we perceive that relative losses may be ascertained with practical accuracy. This statute has not yet been construed by the Supreme Court of the state, nor will the Federal Supreme Court assume in advance that a state court will so construe a statute as to render it obnoxious to the Federal Constitution (Arizona Copper Company v. Hammer, 250 U. S. 400).

The ambiguity claimed with relation to Section 5, is resolved, if in point of law, it be considered that the credit to be applied upon the power bill of the consumer is intended only as exactly equivalent to the amount of the exemption. If it be necessary to take into consideration losses incident to the delivery of power for pumping purposes, we have seen that such losses may be ascertained. The statement of Mr. Gadsby that the company is wholly unable to ascertain the location of the lands to be irrigated by the user to whom it delivers power for pumping purposes must be answerable by the fact that in common understanding and either through survey of the premises or statement of the consumer such information is certainly obtainable. It may be further observed that the testimony thus offered was without the scope of the order and decision of the Statutory Court limiting the evidence to be taken to the issues arising under the Commerce Clause.

So far as the severity of the penalty provisions may serve to bring this claimed uncertainty to sharper view, the provisions of section 7 of the Tax Act with respect to false certificates cannot be considered apart from section 8087 of the Compiled Statutes of Idaho (formerly R. C. 6314) which declares that "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence" (State v. Omaechevarria, supra). But this is not an action for collection of tax or penalty. In the Ohio Tax Cases, 232 U. S. 576, 594, (followed in Phoenix Railway Co. of Arizona v. Geary, 239 U. S. 277), this court said:

"But these actions do not involve any present attempt to enforce the penalties, and the act contains a section which in terms declares: 'the sections of this act and every part of such sections are hereby declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof.' The penalty clauses, if themselves unconstitutional, are severable, and there is, therefore, no presnt occasion to pass upon thir validity" (citing cases).

In Pierce Oil Corp. v. Hopkins, supra, the tax act made failure to file the report or pay the tax a misdemeanor.

In State v. Bird, 29 Idaho 47, where the provision for imprisonment in addition to fine for operation without a license was held without warrant in law, the remainder of the act was enforced. It can not be considered from the terms of the statute and the facts with which they deal that the court cannot interpret the act with such certainty that there is no question of the taxpayer's liability and obligation. An act will not be declared inoperative and ineffectual on the ground that it furnishes no adequate means to secure the purpose for which it is passed, if men of common sense and reason can devise and provide the means, and all the instrumentalities necessary for its execution are within the reach of those intrusted therewith. Detroit v. Rush, 82 Michigan 532. "The method adopted would seem to be reasonably fair and accurate, as much so, at least, as most methods in use for computing taxes on the profits of business, which are universally upheld." South Carolina cases, 52 Fed. (2nd) at 522.

CONCLUSION

We respectfully urge that the decree of the Court below should be affirmed.

Respectfully submitted,

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APPENDIX

CHAPTER 3

(H. B. No. 3)

AN ACT

LEVYING A LICENSE TAX OF ONE HALF MILL PER KILOWATT HOUR ON ELECTRICITY AND ELECTRICAL ENERGY GENERATED, MANUFACTURED OR PRODUCED IN THE STATE OF IDAHO FOR BARTER, SALE OR EXCHANGE; AND PROVIDING FOR THE COLLECTION AND DISTRIBUTION OF SUCH TAX; AND FOR FORMS AND PROCEDURE TO BE USED AND FOLLOWED; REQUIRING REPORTS OF THE PRODUCTION OF ELECTRICITY AND ELECTRICAL ENERGY AND THE FURNISHING OF EQUIPMENT FOR MEASURING SAME; PRESCRIBING PENALTIES FOR VIOLATION OF THIS ACT; EXEMPTING FROM SUCH LICENSE TAX THE ELECTRICITY AND ELECTRICAL ENERGY ACTUALLY USED FOR PUMPING WATER FOR IRRIGATION PURPOSES ON LANDS IN THE STATE OF IDAHO AND PROVIDING THAT SUCH EXEMPTIONS SHALL ACCRUE TO THE BENEFIT OF THE CONSUMER OF SUCH ELECTRICITY AND ELECTRICAL ENERGY; PRESCRIBING THE DUTIES OF THE STATE COMMISSIONER OF LAW ENFORCEMENT UNDER THIS ACT, REQUIRING HIM TO GIVE A BOND FOR THE FAITHFUL PERFORMANCE OF SAID DUTIES AND FIXING THE AMOUNT THEREOF, AND MAKING AN APPROPRIATION WITH WHICH TO CARRY OUT ITS PURPOSES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That in addition to the licenses and taxes now provided by law, each and every individual, firm, partnership, common law trust, corporation, association or other organization, now engaged or hereafter to engage in the generation, manufacture or production of electricity and electrical energy in the State of Idaho, either through water power or by any other means for barter, sale, or exchange, and hereinafter referred to as the "producer", shall on or before the fifteenth day of each calendar month, beginning with the 15th day of July, 1931, render a statement to the Commissioner of Law Enforcement of the State of Idaho of all electricity and electrical energy generated, manufactured or produced by him or it in the State of Idaho, during the preceding calendar month and therewith pay a license tax of one-half (½) mill per kilowatt hour on all such electricity and electrical energy so generated, manufactured or produced, measured at the place of production and as shown on such statement in the manner and within the time hereinafter provided.

SEC. 2. Said license tax shall be remitted with the statement and paid on or before the fifteenth day of each month, beginning with July 15, 1931, to the Commissioner of Law Enforcement, who shall receipt therefor and promptly turn same over to the State Treasurer, as other receipts of his office, and the State Treasurer shall place same to the credit of the General Fund. Taxes not paid on the due date shall become delinquent and shall bear interest from said due date at the rate of ten per cent per annum.

SEC. 3. On or before July 15, 1931, every producer referred to in Section 1 of this Act engaged in the production, generation or manufacture of electricity or electrical energy, shall make and file with the Commissioner of Law Enforcement of the State of

Idaho, on forms prescribed, prepared and furnished by the Commissioner of Law Enforcement, a duly acknowledged and verified certificate which shall contain: (a) the name under which the producer is transacting business in the State of Idaho; (b) his or its post office address and principal place of business within the state; (c) the address and location of his or its production plants or stations in Idaho; (d) the name and address of the managing agent; (e) the names and addresses of the several persons composing any firm or partnership constituting the producer, and, if a corporation, the corporate name under which it is authorized to transact business and the names and addresses of its officers, directors, resident general agent and attorney in fact; (f) certified copies of any papers necessary to show that such producer has complied with the laws of the State of Idaho in order to transact business in Idaho.

SEC. 4. Every such producer shall on or before the fifteenth day of each calendar month, beginning with July 15, 1931, and monthly thereafter, render to the Commissioner of Law Enforcement of the State of Idaho on forms prescribed, prepared and furnished by the Commissioner of Law Enforcement, a statement sworn to by the manager, president, secretary or treasurer of such producer, showing the number of kilowatt hours of electricity and electrical energy produced, generated or manufactured by him or it during the preceding calendar month. For the purpose of measuring such electricity and electrical energy such producer shall keep and maintain at the point or points of production, a recording watt hour meter or meters, or other suitable instrument for measuring the electricity or electrical energy produced, of a type to be approved by the Commissioner of Law Enforcement, the recordings therefrom to be kept on file at the principal place of business of such producer within the State of Idaho and same together with the books and records of such producer shall be subject to the inspection of the Commissioner of

Law Enforcement, his deputies or assistants, during reasonable business hours.

SEC. 5. All electricity and electrical energy used for pumping water for irrigation purposes to be used on lands in the State of Idaho is exempt from the provisions of this Act, except in cases where the water so pumped is sold or rented to such irrigated lands. Provided, the exemption here given shall accrue to the benefit of the consumer of such electricity or electrical energy. Provided further that the full amount of such license tax which would have been due from such producers of electricity and electrical energy, if such exemptions had not been made, shall be credited annually for the year in which the exemptions are made on the power bill to the consumer by the producer of such electricity and electrical energy, furnishing such power, and such producer shall include a statement of the amount of electricity and electrical energy exempted by this section, furnished by it for the purpose of pumping water for irrigation purposes on lands in the State of Idaho, to the commissioner of Law Enforcement of the State of Idaho as a part of the statement required by Section 1 of this Act, together with a statement of the credits made on the power bills to the consumers of such electricity and electrical energy for the pumping of water for irrigation to be used on lands in the State of Idaho.

SEC. 6. Any producer of electricity or electrical energy referred to in Section 1 of this Act who shall hereafter engage in the generation, production or manufacture of electricity or electrical energy shall immediately upon purchasing or acquiring the plant, or installing equipment therefore, comply with the requirements of Section 3 of this Act.

SEC. 7. Any person, officer, partner, agent or representative of any producer referred to in Section 1 of this Act, who shall make any false statement or affidavit in any certificate, report or statement herein required to be made to the Commissioner of Law Enforcement hereunder shall be deemed guilty of

perjury and upon conviction shall be punished by imprisonment in the state penitentiary not less than one nor more than fourteen years.

SEC. 8. Any producer referred to in Section 1 of this Act who shall violate any of the provisions of this Act or who shall fail to pay the license tax herein provided for, or any part thereof, when due shall be liable for three times the amount of the unpaid or delinquent tax, in a civil action instituted for that purpose in any court of competent jurisdiction, by the Commissioner of Law Enforcement in the name of the State of Idaho, and in such suit upon application of the State, an injunction may be issued, without requiring any bond, restraining the defendant from continuing to produce electricity or electrical energy so long as any taxes due hereunder from said defendant remain delinquent.

SEC. 9. The State Treasurer shall, on or before the twentieth day of August of each year, beginning with August 20, 1931, prepare and furnish to the chairman of the State Board of Equalization a statement showing the total amount paid into the General Fund for the year ending August 15th of such year from the license tax provided by this Act, and the State Board of Equalization shall deduct such total amount so paid in determining the ad valorem tax for state purposes on real and personal property.

SEC. 10. In addition to any bond provided by law to be given by the Commissioner of Law Enforcement for the faithful performance of his duties, he shall give a fidelity bond in the penal sum of $50,000.00 to the State of Idaho, in the form and manner provided by law for similar bonds of state officers, and duly conditioned for the faithful performance of his official duties prescribed by this Act.

SEC. 11. If any section or provision of this Act be adjudged unconstitutional or invalid for any reason, such adjudication shall not affect the validity of this Act as a whole or of any section or provision thereof

which is not specifically so adjudged unconstitutional or invalid.

SEC. 12. There is hereby appropriated out of any moneys in the General Fund, not otherwise appropriated, the sum of Fifteen Thousand Dollars ($15,000.00) or so much thereof as may be necessary, with which to carry out the purposes of this Act.

Approved March 17, 1931.